IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.N.Chandurkar, C.J.*

*C.R.P.Nos.1605 and 1606 of 1984.
26th February, 1985.

Kishan Gopal Jhavar by Power Agent Shivchand Daga *Petitioner**

v.

Ramanarayan Bhattad and others *Respondents.*

Deed - Construction - Summary suit - Bank guarantee given on account of first defendant to the trial Court as condition for grant of leave to defend - Suit decreed directing first defendant to pay a specified amount to plaintiff - Plaintiff filing application for enforcement of the bond - Trial Court holding that guarantee lapsed on disposal of suit - Revision against order - Scope of bank guarantee explained.

Held: The bank guarantee is a substitute for cash deposit and cannot be treated in any different manner. The very purpose of putting a condition of furnishing bank guarantee before leave to defend a summary suit is granted is that the plaintiff's interest is to be safeguarded and when the suit is decreed the plaintiff has the right to enforce the bank guarantee. The bank guarantee does not automatically lapse nor does the liability come to an end the moment the suit has come to an end. *[Para.4]*

If a bank guarantee is treated as having lapsed the moment the suit comes to an end, then when the claim has been decreed the whole exercise of granting conditional leave becomes futile because the very object of granting such leave is to safeguard the plaintiff's interests in case he succeeds in the suit and to see that the plaintiff is not deprived of the fruits of the decree which he obtains. *[Para.5]*

Cases referred to:-

Girdharilal Mahadulal Agarwal v. Shah Nagji Acholder, A.I.R.1956 Bom.256; *Gopala Iyer v. Thiruvengadam Pillai*, (1917)32 M.L.J.503= 5 L.W.407; *Pannaji Devichand v. Basappa Virappa*, A.I.R.1943 Bom.243; *M.Paramasivam Pillai v. Ramaswami Chettiar*, (1939)1 M.L.J.557= I.L.R. (1939) Mad.290= 48 L.W.760= A.I.R.1939 Mad.152.

Petitions under section 115 of the Act V of 1908 praying the High Court to revise the order of the I Additional Judge, City Civil Court, Madras dated 5.4.84 and made in I.A.Nos.4529 and 5746 of 1984, in O.S.No.2259/81 respectively.

V. Srinivasan, for Petitioner.

K.R.Ramabhadran, for Respondent.

The Court made the following

ORDER:- These revision petitions are directed against the orders of the City Civil Court at Madras, which on the face of them appear to be extremely unusual, having regard to the facts of the case and the nature of the decree in question. Admittedly the first defendant who is the first respondent in C.R.P.No.1605 of 1984 and the sole respondent in C.R.P.No.1606 of 1984, was not granted leave to defend a summary suit which was filed by the plaintiff in this Court. His request for unconditional leave was

rejected by the Master, by the learned Single Judge and by a Division Bench of this Court. The matter was taken to the Supreme Court by the first defendant. On September 11, 1978, the Supreme Court made an order as follows:-

"Counsel for the appellant (first defendant) agrees to furnish a bank guarantee for Rs.83,375/- before the Registrar, Madras High Court, within five weeks from to-day. Leave to the defendant to appear and defend is hereby granted but it will stand revoked if the bank guarantee above-mentioned is not furnished within five weeks from to-day. Bank guarantee to be renewed every six months so long as the suit is pending. The written statements to be filed within three months after the bank guarantee is furnished."

With these observations, the first defendant's appeal was allowed. A bank guarantee for a sum of Rs.83,375/- was given in the form of a letter of guarantee dated 16.10.1978 by the Central Bank of India in favour of the Registrar of the High Court, Madras on account of Shri K.Ramanarayan Bhattad, 127, Angappa Naicken Street, Madras-1 (first defendant). This bank guarantee was renewed from time to time.

2. The suit proceeded to trial and a decree was passed on 6.2.1984 as follows:-

"1. that the first defendant do pay plaintiff Rs.75,000/- with interest at 6% from date of plaint till payment;
2. that the first defendant shall have the amount paid by defendants 2 to 6, 8 and 9 to the plaintiff to discharge the decree;
3. that the first defendant shall have indemnity for the sum of Rs.75,000/- with interest at 6% and pro costs.
4. that defendants 1 to 6, 8 and 9 do pay plaintiff Rs.6,004/- (Rupees six thousand and four only) as and for the costs of the suit as taxed."

After the decree was passed, the plaintiff filed I.A.No.5746 of 1984, praying that the Central Bank of India which furnished the bank guarantee should be directed to deposit the entire amount covered under the bank guarantee, to be credited to the suit so that it should be paid over to the plaintiff and a prayer was also made that after the money was received, the payment of the same should be ordered to be made to the plaintiff.

3. An application, I.A.No.4529 of 1984, also came to be made by the first defendant in which he stated that an adjustment of Rs.75,000/- which was made under an agreement between the first defendant on one side and defendants 2 to 7 and 9 on the other was binding on the plaintiff and therefore it was for defendants 2 to 7 and 9 to pay the amount to the plaintiff. According to the first defendant, the decretal amount has to be paid by defendants 2 to 7 and 9 to the plaintiff and not by the first defendant. The first defendant contended that it was just and equitable that the plaintiff should proceed against defendants 2 to 7 and 9. On these grounds, the first defendant sought the cancellation of the bank guarantee executed by him in favour of the plaintiff in respect of the suit. Both these applications were disposed of by the I Additional Judge, City Civil Court, Madras. The learned Additional Judge took the view that while disposing of the suit, the court, on assessment of the evidence, had come to the conclusion that by reason of the agreement Exhibit B-1, defendants 2 to 7 and 9 were liable to pay the amount covered by the decree to the plaintiff and therefore it was but fair and appropriate that the plaintiff should execute the decree at the first instance against defendants 2 to 7 and 9. The trial Court noticed that it was not the case of the plaintiff that it was impossible to realise the amount from defendants 2 to 7 and 9 or that they were not possessed of any means to satisfy the decree. The trial Court then observed:-

"In that context the bank guarantee which was furnished under orders of the Supreme Court to grant leave to the petitioner-first defendant to defend the suit which was filed as an under Chapter one cannot be held to be a guarantee to be continued till the disposal of the matter either in first

appeal or in appeal upto the Supreme Court. Now that defendants 2 to 7 and 9 are primarily liable to satisfy the decree and there is no allegation that these defendants have no means to satisfy the decree. I feel it will be in the interest of justice to grant the relief prayed for by the petitioner (first defendant)."

With the above observation, the trial Court made the order that the bank guarantee furnished by the first defendant will stand cancelled. Consequently the application made by the plaintiff-decree-holder came to be dismissed. These orders are now challenged by the plaintiff in these two revision petitions.

4. The plaintiff's contention is very simple. According to him, he is not entitled to enforce the bank guarantee and the trial Court is bound to enforce the bank guarantee and have the amount payable under the bank guarantee appropriated towards the decretal amount in accordance with the decree. The learned counsel appearing on behalf of the first defendant, however, vehemently contended that the order of the Supreme Court merely required a bank guarantee to be given and to be renewed every six months so long as the suit is pending. The argument is that since the suit is now no longer pending and has been disposed of, the bank guarantee cannot be given effect to. In a summary suit to which Order 37 of the Code of Civil Procedure applies, it is usual that the defendant is asked to deposit a certain amount when conditional leave is granted. (See also *Girdharilal Mahadulal Agarwal v. Shah Nagji Acholdas*, A.I.R.1956 Bom.256. When a bank guarantee is allowed to be furnished as a condition precedent for granting leave to defend a summary suit, it is obvious that the bank guarantee is to be furnished in lieu of an amount which the Court has discretion to direct to be deposited in cash before leave to defend the suit is granted. Order XXXVII, Rule 3(5), Code of Civil Procedure, provides that the Court may grant leave to defend the suit unconditionally or upon such terms as may appear to the Court or Judge to be just. It can hardly be disputed that where one of the conditions for granting leave to defend a summary suit is that the defendant should deposit some amount in cash, then in case the suit is decreed, such deposit is liable to be appropriated towards the decretal amount. (See also *Gopala Iyer v. Thiruvengadam Pillai,)* 32 (1917) M.L.J.503= 5 L.W.407. The Bank guarantee which is a substitute for cash deposit cannot be treated in any different manner and the very purpose of putting a condition of furnishing bank guarantee before leave to defend a summary suit is granted is that the plaintiff's interest is to be safeguarded and when the suit is decreed, the plaintiff has the right to enforce the bank guarantee. Now, undoubtedly the Supreme Court has directed that a bank guarantee will be given and renewed every six months so long as the suit is pending. This does not however mean that the moment the suit has come to an end, the bank guarantee automatically lapses or that the liability under the bank guarantee comes to an end.

5. Undoubtedly the bank guarantee has to be construed on the terms of the instrument of guarantee. A guarantee may provide for a period covered by the suit itself or there may be a guarantee which may make provision for the course of litigation even in the appellate court; or a guarantee may be given covering the entire period of litigation between the commencement of the suit and the final conclusion of the litigation by the highest court like the Supreme Court. We are in the instant case not concerned with the contingency as to whether a guarantee given during the pendency of the suit will also ensure to the benefit of the decree-holder if and when the matter is taken in appeal to the first appellate Court or later on to the second appellate Court. There can be a guarantee which is given during the pendency of the suit and the suit may be dismissed in the trial Court but may be decreed in the appellate Court. The question as to whether the guarantee given during the pendency of the suit enures to the benefit of the plaintiff who has failed in the trial Court but has succeeded in the appellate Court will depend upon the

manner in which the bank guarantee is worded. It could also not be disputed that so far as contracts of surety and bank guarantee are concerned, they have to be strictly construed. It appears that it was argued before the learned Additional Judge on the basis of some authorities that the bank guarantee must be treated as having lapsed the moment the suit comes to an end and in that context the learned Additional Judge seems to have observed that the bank guarantee which was furnished under the orders of the Supreme Court to grant leave to defend the suit cannot be held to be a guarantee to be continued till the disposal of the matter in the first appeal or in the appeal to the Supreme Court. With respect, it is difficult to understand these observations. The learned Additional Judge was not dealing with a claim for enforcement of the bank guarantee, as a result of the decision of the appellate Court or of the Supreme Court, in further appeal. The learned Additional Judge was merely concerned with the execution proceedings in respect of a decree which is granted by the said Court, and that decree was in a suit to defend which the first defendant had been given leave on the express condition that he will furnish a bank guarantee. The nature of the order which is made by the learned Additional Judge defeats the very purpose for which the order of bank guarantee is made, when leave is granted to defend a summary suit. If a bank guarantee is treated as having lapsed the moment the suit comes to an end, then when the claim has been decreed, the whole exercise of granting conditional leave becomes futile because the very object of granting conditional leave is to safeguard the interest of the plaintiff in case the plaintiff succeeds in the suit and to see that the plaintiff is not deprived of the fruit of the decree which he obtains.

6. Equally untenable is the ground which the learned Additional Judge has given for discharging the bank guarantee, when the learned Additioanl Judge holds that it is fair and appropriate that the plaintiff should execute a decree in the first instance against defendants 2 to 7 and 9. If the learned Additional Judge has merely read the decree, he would have noticed that primarily the decree is against the first defendant. The decree says, "that the first defendant do pay plaintiff Rs.75,000/- with interest 6% from the date of plaint till payment." When the plaintiff has in his favour a decree worded as above, it is difficult to see how any question of fairness or appropriateness can fall for consideration. The right of the plaintiff-decree holder is governed exclusively by the form and content of the decree and if under the decree the liability is created against the first defendant to pay Rs.75,000/- with interest it was extremely improper on the part of the leanred Additional Judge to deprive the plaintiff-decree-holder of his right founded on the decree by making him to execute the decree against other defendants. A careful perusal of the decree will also show that the decree-holder has not been given any right to execute the decree against defendants 2 to 7 and 9 directly. The obligation cast by clause (2) of the decree is on the first defendant when it says, "that the first defendant shall have the amount paid by defendants 2 to 6, 8 and 9 to the plaintiff discharge the decree. Thus, the obligation being cast on the first defendant by the decree, the trial Court was not justified in directing the plaintiff to proceed against the other defendants. When we came to clause (3) of the decree, it is clear that even that clause contemplates that the primary liability to pay the decretal amount is on the first defendant. When clause (3) reads, "that the first defendant shall have indemnity for the sum or Rs.75,000/- with interest at 6% and pro costs", it obviously contemplates that when the plaintiff-decree-holder has executed the decree against the first defendant, the first defendant is entitled to avail of the provision in clause (3) of the decree which, while containing the right of the first defendant to be reimbursed, also is a repoaltory of the obligation of the other defendants to compensate the first defendant for the sum of Rs.75,000/-. In my view, the learned Additional Judge has fallen into a serious error when, in the order made by him, he tried to modify the rights which had crystalised in the form of a decree.

7. The two decisions on which the learned counsel for the first defendant has relied are clearly distinguishable. In *Pannaji Devichand v. Basappa Virappa*, A.I.R.1943 Bom.243, the surety bond by its express terms referred only to the appeal in the High Court. In that case the suit was decreed in the plaintiff's favour, the defendants had filed an appeal to the High Court, the High Court confirmed the decree of the trial Court and the appellants then filed an appeal by leave to the Privy Council. The decree of the High Court was reversed by the Privy Council and the suit was dismissed with costs. What had happened earlier was, when the defendants filed the first appeal, the plaintiff had filed an execution application for executing the decree of the trial Court. The decree-holder had recovered the decretal amount. When the judgment-debtors applied to the High Court for stay of execution, the High Court had ordered that the plaintiff should be allowed to execute the decree on furnishing security to the satisfaction of the trial Court. He had furnished two sureties and the question was whether those sureties would become liable for restitution when the suit was dismissed by the Privy Council. On those facts, the High Court held that the liability of the sureties could not be extended to the decision given by the Privy Council reversing the decision of the High Court.

8. Similar are the facts of the decision in *M.Paramasivam Pillai v. A.V.R.M.S. P.S.Ramaswami Chettiar and another*, (1939)1 M.L.J.557= I.L.R. (1939) Mad.290= 48 L.W.760= A.I.R.1939 Mad.152. In that case it was held that the defendant's surety was not liable as the terms of the surety bond were absolutely explicit and its language could not extend the liability of the surety to the contingenecy which was not referred to in the surety bond, namely, there being a Letters Patent Appeal against the appeal filed by the defendant.

9. Both these decisions are wholly inapplicable to the facts of the present case. As already pointed out, we are not now concerned with the enforcement of the bank guarantee consequent upon any liability being fastened as a result of a decision of the appellate Court. The bank guarantee in this case was expressly given on account of the first defendant by the Bank to the trial Court and it is being enforced by the trial Court, when the decree has been passed by the trial Court against the first defendant.

10. In the result, therefore, the orders of the learned Additional Judge are set aside. The application of the first defendant being I.A.No.4529 of 1984 must therefore stand dismissed and the application made by the plaintiff-decree-holder being I.A.No.5746/84 will have to be allowed. The trial Court is directed to enforce the bank guarantee and credit the amount recovered in pursuance of the bank guarantee to the account of the decree in O.S.No.2259 of 1981 and pay the same to the plaintiff-decree-holder, unless there are any orders to the contrary by any appellate Court. The Civil Revision Petitions are allowed and the petitioner will get the costs of these petitions from the first defendant, one set.

R.S. ---- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*S.A.No.1971 of 1979. *14th August,* 1984.

Sethurama Udayar *Appellant**

v.

Chidambaram Municipality, rep. by its Executive Authority Commissioner *Respondents*

Tamil Nadu District Municipalities Act (V of 1920), section 345, prescribing a period of limitation for proceedings - Provisions of Art. 62 of the Limitation Act would not apply to suits, distraint proceedings and to prosecution under the Act.

Under section 345 of the District Municipalities Act, a provision of limitation is fixed and this is made applicable to the distraint proceedings, institution of suit and to prosecution; when a special enactment prescribes a period of limitation, the provisions of the general law, viz., the Limitation Act will not be applicable. *[Para.2]*

Case referred to:-

Shidrao Narayan Rao Gumaste Patil v. Municipality of Athani, A.I.R.1943 Bom.21.

The Court delivered the following

JUDGMENT:- The plaintiff, Chidambaram Municipality, claimed arrears of property tax from the defendant due for the period 1970-71 second half to 1975-76 second half, amounting to Rs.179.90. The defence was that the claim for arrears of tax for more than 3 years from the date of plaint, is barred by limitation. The trial Court in a lacanic judgment, decreed the suit on the ground that the defendant has not shown as to how the claim for more than three years is barred by limitation. On appeal, the Appellate Judge relied on a decision in *Shidrao Narayan Rao Gumaste Patil v. Municipality of Athani,* A.I.R.1943 Bom.21 and came to the conclusion that a claim to enforce payment of money, which is a charge on an immovable property, not only by an agreement between the parties, but also by operation of law, will be governed by Article 132 (corresponding to Article 62 of the New Act) of the Limitation Act and that therefore, the period of limitation for recovery of the amount is 12 years and the suit is well within time and accordingly he dismissed the appeal, confirming the judgment and decree of the trial Court.

2. The short question in this second appeal is, whether the suit for recovery of property tax arrears for the period 1970-71 second half to the period upto 13.10.1973 is barred by limitation. The plaint was presented in Court on 14.10.1976. Under section 85 of the Tamil Nadu District Municipalities Act, 1920, the property tax on buildings and lands shall, subject to the prior payment of land revenue, if any, due to the Government thereon, be a first charge upon the said buildings and lands. Under Article 62 o the Limitation Act, 12 years' time is prescribed for enforcing a charge on the immovable property, the period being calculated from the time "when the money sued for becomes due". If Article 62 applies, the suit will be well within time. But what the court below has overlooked is that section 345 of the District Municipalities Act prescribes only a period of three years for recovering any sum due to the Municipal Council under the Act. Section 345 of the Act runs thus:

> "345. No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the municipal council under this Act after the expiration of a period of three years from the date on which distraint might first have been made, a suit might first have been instituted, or prosecution might first have been commenced, as the case may be, in respect of such sum."

Arrears of property tax is undoubtedly a "sum due to the Municipal Council payable under the Act"; under section

345 of the District Municipalities Act, a special provision of limitation is fixed and this is made applicable to the distraint proceedings, institution of suit, and to prosecution. When a special enactment prescribes a period of limitation, the provisions of the general law, viz., the Limitation Act, will not be applicable. In that view of the matter, the court below is wrong in holding that Article 62 of the Limitation Act will govern the present case.

In the result, the appeal is allowed in part, the decree and judgment of the courts below are modified and the suit will stand decreed for the tax arrears due for the period commencing from 14.10.1973 to the second half of 1975-76. In other respects, the appeal will stand dismissed. There will be no order as to costs.

R.S. ---- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Natarajan, J.*

*W.P.No.7728 of 1984. 30*th July*, 1984.

S.M.C.Veerappan *Petitioner**

v.

The Commissioner, H.R. and C.E., Madras-34 and others *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 26 and 54 - Sections relate to the appointment of hereditary trustees and not to fit persons - Entitlement to be appointed a trustee does not cloths a person with a right to be appointed a fit person.

The appointment of the petitioner as a fit person to take charge of a kattalai and administer an endowment was set aside by the first respondent on the ground that he was nor a proper person to be appointed as a fit person because his father, acted in concert with one M and had alienated the properties belonging to the kattalai. The petitioner filed a writ petition basing his contention on sections 26 and 54 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, challenging the validity of the order.

Held:- Sections 26 and 54 of the Act relate to the appointment of hereditary trustees to religious institutions. They can have no application to the controversy on hand, namely an order of appointment for the post of a Fit Person. It may be that the petitioner, notwithstanding the alleged laches committed by his father, is entitled to be appointed as one of the three trustees, but that entitlement will not clothe him with the right to say that he alone should be appointed as a Fit Person. As a trustee, he will be one of the three persons entrusted with the management of the endowment, but as a Fit person he will be the sole authority to administer

the endowment. Therefore there is nothing wrong in the first respondent taking that fact into consideration and holding that in the interests of the institution, the appointment of the petitioner as a Fit person and the entrustment of the entire affairs of the endowment to the petitioner will not be a prudent course to be followed. *[Para.3]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *Certiorari* calling for the connected records of the first respondent relating to his order dated 22-6-1984 and made in ..No.32 of 1982 and quash the same.

K.Jayaraman, for Petitioner.

The Court made the following

ORDER:- An order passed by the second respondent appointing the petitioner as a Fit Person for a Kattalai of specific endowment known as Sri Raman Chettiar Kattalai attached to Sri Marudheeswarar temple, Thiryvanmiyur, Madras, was set aside by the first respondent herein and it is the validity of that order that is impugned by the petitioner herein.

2. The endowment was created by the petitioner's grandfather and it was managed and administered by him during his lifetime. After his lifetime his son, one Somasundaram Chettiar, who is the petitioner's father, was administering the endowment. Now there is a scheme governing the endowment and as per the said scheme, the endowment has to be administered by a Board of trustees consisting of three persons viz., (1) a descendent of the donor; (2) a representative of the Nagarathar community; and (3) a member belonging to the Scheduled caste. All the three persons have to be appointed by the competent authority exercising powers under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 22 of 1959. After Somasundaram Chettiar, the management of the endowment has been vested in the third respondent herein, viz., the Executive Officer of Sri Marudheeswarar temple and the said officer in manging the same. Pursuant to the first respondent passing an order in Na.Ka.No.85654/83 dated 26-9-83, the appointment of trustees temporarily was stopped. Thereupon the second respondent appointed the petitioner as a Fit Person to take charge of the Kattalai and dminister the endowment. On the strength of that order, the petitioner wanted the third respondent to hand over charge of the endowment to him. But the third respondent disputed the validity of the order of appointment and preferred a revision to the first respondent. Two grounds were taken by him in the revision, viz., (1) the petitioner is not a proper person to be appointed as a Fit Person, because his father, acting in concert with one Michael, had alienated the properties belonging to the Kattalai and thus acted against the interests of the institution; and (2) the second respondent had no jurisdiction to appoint a Fit Person, because the temple was having an income of more than a lakh of rupees per year and in such cases it is only the Government that has power to appoint trustees or Fit Person. The first respondent did not go into the merits of the second contention, but sustained the first ground of objection and set aside the order of the second respondent. Aggrieved by that order, the petitioner has filed this writ petition.

3. The learned counsel for the petitioner would say that since the petitioner is a descendant of the donor he is entitled to be appointed as Fit Person and the sins committed by his father, if any, should not be allowed to be visited on him. In support of this argument, the learned counsel places reliance on sections 26 and 54 of the Act. Those sections relate to appointment of hereditary trustees to religious institutions. They can have no application to the controversy on hand, because we are not now concerned with an order of appointment for the post of a hereditary trustee, but an order of appointment for the post of a Fit Person. It may be that the petition, notwithstanding the alleged laches committed by his father, is entitled to be appointed as one of the three trustees, but that

entitlement will not clothe him with the right to say that he alone should be appointed as a Fit Person. As a trustee, he will be one of the three persons entrusted with the management of the endowment, but as a Fit Person he will be the sole authority to administer the endowment. Therefore there is nothing wrong in the first respondent taking that fact into consideration and holding that in the interests of the institution, the appointment of the petitioner as a Fit Person and the entrustment of the entire affairs of the endowment to the petitioner will not be a prudent course to be followed. In such circumstances, the attack of the petitioner on the order passed by the first respondent cannot be countenanced.

4. For the aforesaid reasons the petitioner is not entitled to the issue of a rule and the petition will stand dismissed.

R.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and K.Shanmukham, JJ.*

*W.A.Nos.854,855 of 1983 and W.P.No.2010 of 1979. *11th December, 1984.*

A.Mukyaprana Rao *Appellant**

v.

The Government of Tamil Nadu represented by the Chief Secretary to Government, Fort St., George, Madras-9 and others *Respondents.*

and

M.Ebenezer *Petitioner**

v.

The Government of Tamil Nadu represented by the Chief Secretary, Fort St., George, Madras-9 and others *Respondents.*

Constitution of India (1950), Articles 14 and 16 - Government passing an order rendering the ratio of promotion to the posts of Regional Transport Officers from 1:1 to 1:4 as between the administrative side and technical side - Decision based on a policy for the better administration of the Department - Held nor violative of the Constitution.

In this case though originally equal treatment was given to the two feeder categories, non-technical and technical in the Transport Department in the matter of promotion, the Government had changed their policy and adopted a higher ratio for one source, the technical category. The classification is made between these two sources, technical and non-technical with a view to secure better administration of the Transport Department and also to see that people with technical qualification get more promotional opportunities as Regional Transport Officers. The classification of persons coming from two separate feeder categories in the matter of fixation of the ratio for promotion

so long as it has a rational nexus with the object of securing better administration of the department, cannot be successfully challenged.

Cases referred to;-

Govind Dattatray v. Ch.Controller of Imports and Exports, (1967)2 S.C.J.182= (1967)2 S.C.R.29= A.I.R.1967 S.C.839; *Jaisinghani v. Union of India*, (1967)1 I.T.J.903= (1967)2 S.C.J.102= 65 I.T.R.34= A.I.R.1967 S.C.1427.

Appeals under Clause 15 of Letters Patent against the Order of Mr.Justice Nainar Sundaram dated 25.2.1983, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.1137 of 1980 presented under Article 226 of the Constitution of India to issue a Writ of Declaration, declaring clause 2(c) of the Rules of the Tamil Nadu Government dated 26-6-1978 and made in G.O.Ms.No.1461, Home (Transport II) Department, (provision under which ratio of promotion to the post of Regional Transport Officers has been reduced from 1:1 to 1:4 as between the administrative side and the technical side respectively of the Transport Department) as unconstitutional, contravening Articles 14 and 16 of the Constitution of India and etc.,

G.Ramaswami for M.Kalyanasundaram. for Appellants.

Advocate General, for Government Pleader and *V.Sridevan*, for Respondents.

The Order of the Court was made by

Ramanujam, J.:- Since the points involved are the same in all these cases, they are dealt with together.

2. Writ Appeal Nos.854 and 855 of 1983 have been filed against the judgment rendered by Nainar Sundaram, J. in Writ Petition No.1137 of 1980; the first one by the petitioner in the Writ Petition and the second by the 7th respondent therein. The appellant in Writ Appeal No. 854 of 1983 sought in Writ Petition No. 1137 of 1980 the issue a Writ of Declaration declaring clause 2(c) of the Rules made in G.O.Ms.No.1461, Home (Transport II) dated 26.6.1978 issued by the Tamil Nadu Government under which the ratio of promotion to the post of Regional Transport Officers has been reduced to 1:4 from 1:1 as between the administrative side and the technical side respectively of the Transport Department as unconstitutional as it contravenes Articles 14 and 16 of the Constitution of India. That Writ Petition was originally heard by Padmanabhan, J. who by his order dated 2.4.1982 allowed the Writ Petition and declared the above clause 2(c) of the Rules as unconstitutional. Earlier in Writ Petition No.2010 of 1979 filed by one M.Ebenezer, Superintendent, Office of the Regional Transport Officer, Tiruchirappalli the same rule was challenged as being violative of Articles 14 and 16 of the Constitution. V.Ramaswamy, J. by his order dated 17th July, 1979, rejected the said contention and dismissed the Writ Petition. Writ Appeal No.421 of 1979 was preferred as against the decision of V.Ramaswamy, J. While that Writ Appeal was pending respondents 1 to 3 in Writ Petition No.1137 of 1980 which was disposed of by Padmanabhan, J. preferred Writ Appeal No.375 of 1985 against the said order of Padmanabhan, J. There were other Writ appeals filed by the other respondents who have been brought on record subsequently and they were Writ Appeals Nos.256 and 257 of 1982. All the said four writ appeals were heard by a Division Bench and at that stage the State Government filed as additional affidavit with the permission of the Court bringing in certain fresh facts as forming the basis for the reduction of the ratio of promotion complained of in the writ petitions and requested the Bench to take those factors also into consideration. The learned counsel appearing for the petitioner in W.P.No.1137 of 1980 and the respondent in Writ Appeal No.375 of 1982 had submitted before the Bench that if these additional factors are to be taken into account, a reply affidavit has to be filed and there should be a re-hearing of the whole matter. At that stage the Division Bench felt that the correct course would be to set aside the orders of both Padmanabhan, J. in Writ Petition No.1137 of 1980 and that of V.Ramaswami, J. in Writ Petition

No.2010 of 1979 and to remit the matter to the Writ Court for fresh and fuller consideration. It is in pursuance of the said remit order, Writ Petition No.1137 of 1980 came to be heard afresh by Nainar Sundaram, J. Writ Petition No.2010 of 1979 having been ordered to be posted for disposal after Writ Petition No.1137 of 1980 is disposed of, it was not posted along with the other Writ Petition. Nainar Sundaram, J. after hearing the parties has chosen to dismiss the Writ Petition by his judgment dated 2.4.1982 on the ground that the grounds of attack put forward by the writ petitioner cannot legally be sustained. It is the said decision of Nainar Sundaram, J. which is under challenge in these two writ appeals.

3. The dispute between the parties relates to the procedure to be followed for making recruitment for the post of Regional Transport Officers (R.T.O. for short). In G.O.Ms.No.566, Home, dated 18-2-1965 it was provided that recruitment to R.T.O. shall be made by transfer from the post of (1) Superintendents in the Secretariat in Home and Industries, Labour and Co-operation Departments. (2) Superintendents in the Office of the Transport Commissioner or in the Regional Transport Offices and (3) Motor Vehicles Inspectors. The said G.O. was made under Article 309 of the Constitution of India, and this amended the general and special rules applicable to the posts of Assistant Secretaries and Regional Transport Officers in Class II of the Madras Transport Service. These rules were again amended in G.O.Ms.No.61, Home, dated 10.1.1968. As per the amended rules recruitment of Regional Transport Officers shall be by transfer from among (a) the Assistant Secretaries, State Transport Authority (Category 1) or (b) promotion from among the Joint Regional Transport Officers, (c) recruitment by transfer on tenure basis for a period of three years from among the Joint Regional Transport Officers, (d) recruitment by transfer on tenure basis for a period of three years from among the Deputy Collectors in the Madras Civil Service (Executive branch) or (d) recruitment by transfer from among the Superintendents in the Department of Secretariat. Thus in the said G.O. dated 10.1.1968 the Superintendents in the Office of the Transport Commissioner and in the Regional Transport Office have been taken out from the feeder categories of Regional Transport Officers. Thereafter, the Government passed G.O.Ms.No.1461 Home dated 26-6-1978 which further modified the rules relating to the recruitment of Regional Transport Officers. Under the rules as amended in 1978 the recruitment to the posts of Regional Transport Officers shall be (1) by transfer from among Motor Vehicle Inspectors, Grade I in the Tamil Nadu Transport Subordinate Service or (2) Superintendents Selection Grade and Personal Assistants to Regional Transport Officers in the Tamil Nadu Ministerial Service and (3) for special reasons by recruitment by transfer from any other service on tenure basis. Clause 2(c) of the Rules made in G.O.Ms.No.1461 Home (Transport II) Department dated 26-6-1978 has altered the ratio of promotion to the post of Regional Transport Officer from 1:1 to 1:4 as between the administrative side and the technical side respectively of the Transport Department. This has been attacked as unconstitutional as contravening Articles 14 and 16 of the Constitution. This attack was rejected by Nainar Sundaram, J. on the ground that having regard to the relative strength of technical and non-technical staff in the Transport Department which works out to be 1:5 the ratio of 1:4 fixed between non-technical and technical staff under Rule 2(c) of the Special Rules for the Transport service is fair and reasonable and that a higher proportion given to the technical personnel cannot also be taken exception to, having regard to the rational objective of achieving a better administration of the Transport Department which is in public interest. In this view, the learned Judge upheld the rule 2(c) prescribing a ratio of 1:4 as between non-technical and technical staff for the purpose of promotion to the post of Regional Transport Officer. As against the said judgment of Nainar Sundaram, J. the present appeals have been filed.

4. It is not in dispute that till 18.2.1965 the ratio for promotion from among the Superintendents in the office of the Transport Commissioner, Madras and the

Regional Transport Offices combined with the Superintendents in the Secretariat in Home, Industries and Labour and Co-operation Departments on the one side and the Motor Vehicles Inspectors on the other was 1:1. However, by G.O.Ms.No.566 Home dated 18-2-1965, the post of Joint Regional Transport Officer was created and promotion to the category of Regional Transport Officers was made from the posts of Joint Regional Transport Officers based on the seniority in the latter cadre. It cannot also be disputed that between 1965 and 1978 many changes have taken place in the staff pattern of the Transport Department. While previously the Junior Superintendents and Motor Vehicles Inspectors could be promoted straightaway as Joint Regional Transport Officers as per the ratio, posts of Personal Assistants to Regional Transport Officers and non-technical Motor Vehicles Inspectors were created which gave an avenue of promotion to the Superintendents to a higher category. The posts of Joint Regional Transport Officers were however, abolished in 1974. At that time there were 12 posts of non-technical motor vehicles Inspectors and 11 posts of Personal Assistants to the Regional Transport Officers, in between Superintendents and Regional Transport Officers, and it was considered not necessary to retain the old rule where Superintendents could straightaway be promoted to the cadre of Joint Regional Transport Officers or Regional Transport Officers and, therefore, the posts of Superintendents were deleted from the feeder category of Regional Transport Officers. Thereafter the Government felt that as the work of the Regional Transport Officers involves not only administrative work but also requires technical knowledge for the better performance of his work, the ratio of 1:4 between non-technical and technical staff in the matter of promotion to the post of Regional Trsnsport Officers should be fixed. It is said that such a policy decision which was taken in the larger interests of the administration cannot be questioned by the petitioners as the increase in the percentage is in the interest of the better administration of the Department, and the increase is not arbitrary or discriminatory, nor does it offend Articles 14 and 16 of the Constitution of India. Even according to the qualification, for appointment to the technical side that is as Motor Vehicles Inspector the requisite qualification is S.S.L.C. with diploma in Automobile Engineering or Mechnical Engineering whereas for the appointment to the administrative side the requisite qualification is only S.S.L.C. It has been therefore felt by the Government that the persons on the technical side having a better qualification should be given more representation in the matter of promotion to the posts of Regional Transport Officers. This, according to respondents cannot be said to be unreasonable or amount to an unequal treatment as between equals.

5. Before us Mr.G.Ramaswami, learned counsel for the appellants in the appeals contends that the functions of Regional Transport Officer are substantially administrative as seen from Sections 44(5), 44-A and Rule 133-A and 134-AA and it is idle to contend that the functions of the Regional Transport Officers are more technical than administrative and, therefore, the higher proportion given to the technical staff in the matter of promotion to the posts of Regional Transport Officers is arbitrary and discriminatory in nature. According to the appellants the functions of the Regional Transport Officer are purely administrative and he merely exercises the functions delegated by the Regional Transport Authority and the Transport Commissioner as per the provisions of the Motor Vehicles Act and the rules. He also exercises other functions which are purely of an administrative nature, and those functions should be traced to the statutory provisions referred to above. Even assuming that the functions of the Regional Transport Officer are more of the administrative nature before the fixation of the ratio of 1:4, it does not prevent the Government from deciding as a matter of policy to appoint more technical people to the post of Regional Transport Officers with a view to modernise or streamline the functions of the Department. As a matter of policy if the Government decides that the cadre of Regional Transport Officer should hereafter consist of mostly technical persons,

it is not open to the appellant to question that policy and say that the posts of Regional Transport Officers should be held only by non-technical people. So long as the decision of the Government based on a policy is for the better administration of the department and in public interest, that policy cannot successfully be challenged on the ground that such a policy is neither warranted or expedient. It is no doubt true, earlier the ratio between non-technical and technical staff was 1:1. But the appellants have no vested right to have the same ratio continued for eternity. The ratio fixed at a particular point of time is always subject to alteration based on the modification of the policy of the Government, apart from the question that the alteration was based on the Government policy, to man the posts of Regional Transport Officers, by people with more technical knowledge. The existing structure of the staff pattern in the Transport Department was in the ratio of 1:5 between non-technical and technical personnel, and with a view to secure fair and proper treatment to everyone in the feeder category for the purpose of promotion to the posts of Regional Transport Officers, technical people who are five times the non-technical personnel are given a higher ratio, in the matter of promotion. Therefore the revision of the ratio as 1:4 as against 1:1 that existed before between non-technical and technical personnel appears to be fair and equitable even on merits. Nainar Sundaram, J. has held that the technical personnel and non-technical personnel are governed by two separate sets of service rules, the former being governed by the Tamil Nadu Ministerial Service Rules and the latter being governed by the Tamil Nadu Transport Service Rules. The requisite qualification for the non-technical side is only S.S.L.C. while the requisite qualification for the technical side is not only S.S.L.C. but also a Diploma in Automobile Engineering or Mechanical Engineering. Therefore non-technical personnel and technical personnel cannot be treated as equals.

6. The learned counsel for the appellants would, however, say that both non-technical and technical personnel were treated as equals all these years and it is only on that basis the ratio of 1:1 in the matter of promotion was fixed. Merely because the ratio of 1:1 as between non-technical and technical personnel was fixed in the matter of promotion, it cannot be said that the technical and non-technical personnel were treated alike. From the mere fact that the same ratio has been fixed in the matter of promotion as between the two feeder categories, it cannot be said that the two categories are equal. As already stated, in the matter of qualifications, they are not equals. Similarly there is a difference in the nature of their duties. Therefore, it is not possible to equate the technical personnel with the non-technical personnel in the matter of promotion. Providing for equal promotional opportunities to two distinct classes such as non-technical and technical personnel may not by itself make them equals, and any subsequent alteration in the ratio for the purpose of promotion will not attract Articles 14 or 16(I) of the Constitution, so long as the non-technical and technical personnel cannot be treated as equals. It has been held in *Govind Dattatray v. Ch.Controller of Imports and Exports*, (1967)2 S.C.J.182= (1967)2 S.C.R.29= A.I.R.1967 S.C.839:

> "The relevant law on the subject is well settled and does not require further elucidation. Under Article 16 of the Constitution of India there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from the office to a higher office thereunder. Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only the promotees are drawn from the same source. If the preferential treatment to one source in relation to the other

is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification. There can be cases where the differences between the two groups of recruits may not be sufficient to give any preferential treatment to one against the other in the matter of promotions, and, in that event a Court may hold that there is no reasonable nexus between the differences and the recruitment."

The Supreme Court again reiterated the same principle in *Jaisinghani v. Union of India*, (1967)1 I.T.J.903= (1967)2 S.C.J. 102= 65 I.T.R.34= A.I.R.1967 S.C.1427.

7. In this case, though originally equal treatment was given to the two feeder categories, non-technical and technical in the matter of promotion, the Government have changed their policy and adopted a higher ratio for one source, the technical category, compared to the other source, the non-technical category. As already stated, the classification is made between these two sources, technical and non-technical with a view to secure better administration of the Transport Department and also to see that people with technical qualification get more promotional opportunities as Regional Transport Officers. As pointed out by Nainar Sundaram, J. the set up of Transport Department was thoroughly re-organised in 1974. Under the re-organisation set up, the posts of Assistant Transport Commissioner, Assistant Engineer (Motor Vehicles) and Joint Regional Transport Officers were abolished and the posts of Regional Transport Officers were redesignated as District Transport Officers. The main theme of 1974 re-organisation was technical-oriented and it was felt that the technical function of the effective check and control of vehicles, conduct of traffic surveys, inspection of vehicles involved in accidents, liaison with Highways Department on matters relating to traffic engineering and police on traffic control will be more important than the desk work till then contemplated. The Motor Vehicles Inspector as head of the Unit office was made in charge of all work, technical and non-technical. In order to have homogenity in the set up of the Transport department and as only a technical officer can over-check and supervise the work of another technical officer, it was decided to divide the posts as technical and non-technical based on the nature of the work and duties attached to them. Having regard to the said theme of re-organisation, the question of framing special rules for the Transport Service was taken up, and the rules were approved in G.O.Ms.No.1461 Home dated 26-6-1978 which has been impugned in these proceedings. Rule 2(c) of the said Special Rules, taking into consideration (1) the necessity to have a technical officer to supervise the work of a technical officer like the Motor Vehicles Inspector and (2) the necessity to give due representation to the existing personnel both technical and non-technical, the previous ratio of 1:1 was altered as 1:4 between non-technical and technical. At the time of the issue of the impugned G.O. the relevant strength of the non-technical and technical side was found to be 16 on the non-technical side and 76 on the technical side, which works out to a ratio of 1:5 between non-technical and technical staff. To avoid an imbalance and at the same time not to shut out completely the non-technical personnel from having any chance of promotion the ratio was fixed at 1:4 as between non-technical and technical personnel. As already stated, the classification of persons coming from two separate feeder categories in the matter of fixation of the ratio for promotion so long as it has a rational nexus with the object of securing better administration of the department, cannot be successfully challenged.

8. In this view of the matter, we agree with the decision of Nainar Sundaram, J. and dismiss the appeals as also the Writ Petition in which the same point is raised. There will be no order as to costs in any of these cases.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Mohan and T.Sathiadev, JJ.*

*W.P.Nos.10510/81 and 347, 5631 etc. of 1984. *14th June, 1984.*

K.V.Kadiresan & Com., by partner K.V. Kadiresan and others *Petitioners**

v.

The State of Tamil Nadu reptd. by the Commr. and Secy. to Govt. of Tamil Nadu Forest and Fisheries Dept., Fort St. George, Madras-9 and others *Respondents.*

Constitution of India (1950), Articles 301, 302 and 304(b) - Tamil Nadu Timber Transit Rules framed under sections 35 and 36 of the Tamil Nadu Forest Act, 1882 (V of 1882), rules 1-A, 3(b), 2, 3(ii), 7(4) - If impose unreasonable restrictions on freedom of trade, commerce and whether prohibitory and not regulatory - Held that the Rules being regulatory in nature, they are not illegal.

Section 35(d) of the Tamil Nadu Forest Act empowers the Government to make rules providing for the stoppage, reporting, examination and marking of timber in transit, and section 35(k) enables rules being made to regulate the use of property marks for timber and the registration of such marks. Under the Act, the said power having been specifically provided for, the rules as framed come into existence by exercise of the statutory powers conferred on the Government under the Act. If only the impugned rules in these petitions are found to be restrictive, then irrespective of the fact they have been framed under section 35 of the Act, they could be held as offending Article 301. By resorting to rule-making power, the freedom guaranteed under Article 301 cannot be bypassed. But, once the rules are held to be regulatory in nature, the point advanced namely, that for enforcing these regulatory measure the Act itself ought to have been amended by satisfying the requirements contemplated under the proviso to Article 304(b) carries no substance. As to what is the scope, the controlling circumstances which impelled the introduction of the amendment to the rules, the evil to be eradicated, and the object to be achieved, clearly show that the Rules are only regulatory in nature. By securing the hanner mark, a Form II pass, enables the certified timber being moved from point to point without hindrance or delay, which may occur if the owner is to satisfy authorities otherwise about lawful procurement, at every stage, till manufactured articles came into existence. Hence, the impugned rules are not hit by Articles 301 and 304(b). *[Para.31]*

Cases referred to:-

Emperor v. Sibnath Banerji, (1945)2 M.L.J.325: L.R.72 I.A.241: A.I.R.1945 P.C.156; *S.K.Singh v. Shri V.V.Giri*, (1970)2 S.C.J.768: A.I.R.1970 S.C.2097: (1971)2 S.C.R.197; *Om Prakash v. Union of India*, A.I.R.1971 S.C.771; *South Gujarat Roofing Tiles v. Gujarat*, (1977)1 S.C.J.397: (1976) Lab.I.C.1778: (1976)4 S.C.C.601: (1977)1 S.C.R.878: A.I.R.1977 S.C.90; *R.D.Shetty v. International Air Port Authority*, (1979)2 Lab.L.J.217: (1979)3 S.C.C.489: (1979)2 S.C.W.R.210: A.I.R.1979 S.C.1628; *Pathumma v. State of Kerala*, (1978)2 S.C.C.1: (1978)2 S.C.C.537: A.I.R.1978 S.C.771; *M/s. Lakshmi Khandsari v. State of U.P.*, (1981)2 S.C.C.600: A.I.R.1981 S.C.873; *Mohd. Karrar Ali v. The State of U.P.*, AI.R.1954 All.753; *V.L.Patel and Company v. The State of M.P.*, A.I.R.1965 Madh. Prad.211; *Mica Industries Ltd. v. The State of Bihar*, (1971) S.C.R. (Supp) 319: A.I.R.1971 S.C.1182; *Southern Pharmaceuticals and Chemicals v. The State of Kerala*, (1981) Tax.L.R.2838: A.I.R. 1981 S.C.1863; *State of Mysore v. H.Sanjeeviah*, (1967)2 S.C.J.313: A.I.R.1967 S.C.1189: (1967)2 S.C.R.361; *The District Collector of Hyderabad v. Ibrahim and Company*, (1970)1 S.C.J.609: (1970) 2 M.L.J. (S.C.) 109: (1970) 2 An.W.R. (S.C.) 109: (1970)3 S.C.R.498: A.I.R. 1970 S.C.1275; *Automobile Transport Ltd. V. The State of Rajasthan*, (1963)1 S.C.R.491; A.I.R.1962 S.C.1406; *Narendra*

Kumar v. The Union of India, (1960)1 S.C.J.214: (1960)2 S.C.R.375: A.I.R.1960 S.C.430; *Kasi Prasad v. The State of Orissa*, A.I.R.1963 Orissa 24; *State of Tamil Nadu v. M/s. Hind Stone*, (1981)2 S.C.C.205: (1981)2 S.C.R.742: A.I.R.1981 S.C.711.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed therewith the High Court will be pleased to issue (1) Writ of Mandamus forbearing the respondents herein from enforcing the rule 3(iii) of the Tamil Nadu Timber Transit Rules 1968 by demanding Form II permit in respect of the sales of timber cutups so far as the petitioners are concerned (W.P.No.10510/81) etc.

T.V.Ramanujam, K.J.Chandran, R.N.Krishnaraju, V.Ramamurthi, M.Srinivasan, G.John Arthur, P.Jagadeeswaran, S.Selvaratnam, S.Sivasubramaniam, V.Radhakrishnan, M.Venkatachalapathy and D.Raju, for Petitioners.

The Advocate General assisted by *K.R.Natarajan*, Govt. Advocate, for Respondents.

The Order of the Court was pronounced by

Sathiadev, J.:- In these writ petitions, petitioners seek for a declaration that rules 1-A, 3(b), 2, 3(iii) and 8(4) of the Tamil Nadu Timber Transit Rules, 1968 (hereinafter referred to as the Rules) are null, void and hence unenforceable against the petitioners. The relevant rules under challenge are rules Nos.1-A (3)(b), 2, 3(iii), and 7(4). Though at the time of the filing of the writ petitions, these are the relevant rules, petitioners by misconception have referred to different rule numbers, as if they are the relevant rules. It was by G.O.Ms.No.518, Agriculture, dated 23.2.1968, and as amended from time to time, Tamil Nadu Timber Transit Rules were made, in exercise of the powers conferred under sections 35 and 36 of the Tamil Nadu Forest Act, 1882 (III of 1882) a pro-Constitution enactment. The said Act was enacted 'for the protection and management of forests' in the State of Tamil Nadu. Apart from this Act, Tamil Nadu Preservation of Private Forests Act, 1949, Tamil Nadu Hill Stations (Preservation of Trees) Act, 1955, Gudalur Jenmam Estates (Abolition and Conversation into Ryotwari) Act, 1969, etc have been enacted for the preservation of trees and in the larger interests of the State. Respondents state that, in the earlier stages, Timber Transit Rules were promulgated on district basis and that it was only in 1968, for the first time, consolidated rules were made applicable to the whole State of Tamil Nadu. Subsequent to 1968, two amendments brought about in G.O.Ms.Nos.1409, F.&F., dated 30.10.1980 and G.O.Ms.No.971 F.&F., dated 11.8.1983, are relevant for the purposes of these petitions.

2. By G.O.Ms.No.1409, rules 1(3)(b) and 8 were amended to the following effect:-

> "In the said Rules, -
>
> 1. in rule 1, in clause(3), for sub-clause (b), the following sub-clause shall be substituted, namely:-
>
> "(b) timber cut up or fashioned as manufactured articles."
>
> 2. in rule 8, after sub-rule (3), the following sub-rule shall be added, namely:-
>
> "(4) After the application for the removal of timber is received, the District Forest Officer or the District Range Officer concerned shall, as soon as possible, inspect and, if the timber stored qualifies for issue of transport permit, affix the departmental hammer mark on the timber."

By G.O.Ms.No.971, the following amendments were made:-

> "In the said Rules,
>
> (1) Under the Title of the Rules, the words from "in Revenue Districts and Forest divisions other than Nilgiris and areas transferred from Travancore Cochin State" shall be deleted and the words "in Tamil Nadu" shall be added after the word, "Timber".

(2) Under rule 1(2), the words from "including the Kanyakumari District, the Shencottah taluk of the Tirunelveli district and the territories specified in the second schedule, the Andhra Pradesh and Tamil Nadu" should be deleted.

(3) Under the preamble to these Rules, the words from "in the Revenue districts and the Forest divisions specified in the Annexure to those rules" shall be deleted and the words "in the Tamil Nadu" shall be added after the word "Timber".

(4) In sub-rule(3) of rule 1-A, for clause (b), the following clause shall be substituted, namely:-

"(b) All sawn timber where the smallest dimension is less than 5 cm. in thickness and does not exceed 12 decimetres in length";

(5) for rule 2, the following rule shall be substituted, namely:-

2. *Conditions of transit of Timber:-* No person shall move timber into or from or within the State by land, water or air unless such timber is accompanied by a permit prescribed therefor under rule 4:

Provided that where timber is moved within the limits of a Municipality or a Corporation under an invoice given by the Timber Merchants, no permit is necessary for the transport of such timber"

(6) in rule 3,-

(a) sub-rule (ii) shall be omitted and after sub-rule (ii) as so omitted, sub-rules (iii), (iv), (v) and (vi) shall, respectively, be renumbered as sub-rules (ii), (iii), (iv) and (v).

(b) in sub-rule (ii) as so renumbered, the word, expression and words "imported" "referred to in sub-rule (ii)," "and" or "by any Revenue Officer not below the rank of Revenue Inspector" shall be omitted.

(7) In rule 4,-

(a) in sub-rule (b), the words "or any Revenue Officer not below the rank of Revenue Inspector" shall be omitted

(b) in sub-rule (c) the words "or Revenue Officer not below the rank of Revenue Inspector" shall be omitted; and

(c) sub-rule (c) shall be omitted, and after sub-rule (c) as so omitted, the sub-rules (f), (g) and (h) shall, respectively, be renumbered as sub-rules (c), (f) and (g).

(8) rule 5 shall be omitted, and after rule 5 as so omitted, rules 6,7,8,9,10 and 11 shall respectively, be renumbered as rules 5,6,7,8,9 and 10.

(9) in sub-rule (i) of rule 5 as so renumbered, the words and expression "Revenue" and "Any Revenue Officer not below the rank of Revenue Inspector", in charge of a firka or 'respectively', wherever it occurs, shall be omitted.

(1) for rule 6 as so renumbered, the following rule shall be substituted, namely:-

"6. *Situation of checking stations:-*(i) The checking stations for timber in transit shall be fixed at any place as deemed necessary by the Government and checking of timber in transit shall not be made within the limits of Municipalities and Corporations, except.

(a) in cases in which it is considered necessary to guard against smuggling from unreserved lands into towns, or

(b) in places which afford special facilities for the regulation of traffic such as the mooting of roads and water ways.

(ii) No demand shall be made under those rules for the production of a permit within the limits of Municipalities and Corporations, except at the checking stations.

(11) in rule 7 as so renumbered,-

(a) the words "if moved within the areas specified in Schedule B" shall be omitted;

(b) in the Explanation, the following shall be added at the end, namely:-

"All sawn timber where the smallest dimension is not less than 5 c.m. in thickness and does not exceed 12 decimetres in length shall qualify as "Timber" for fixing with departments.

12. for the Annexure, the following Annexure shall be constituted, namely:-

ANNEXURE

All Revenue Districts in the State."

13. Schedule A,B,C shall be omitted."

3. The impugned rules and they are in force as on date, are as follows:-

"*Rule 1-A(3)(b)*- "timber" includes all classes of timber as defined in the Act, except:-

(a) -----

(b) All sawn timber where the smallest dimension is less than 5 c.m. in thickness and does not exceed 12 decimetres in length."

Rule 2: Conditions of transit of timber:- No person shall move timber into or from or within the State by land, water, or air unless such timber is accompanied by a permit prescribed therefor under rule 4:

Provided that where timber is moved within the limits of a Municipality or a Corporation under an invoice given by the Timber merchants, no permit is necessary for the transport of such timber.

(G.O.Ms.No.971, F. & F. dt.11.8.83).

Explanation:- Timber found on, or on the margin of, any public road, whether loaded in carts or other vehicles or not and timber found in any river or stream whether tied into rafts or not or loaded in boats on coracles or not, and timber found in, or on the margin of, any canal or reservoir, whether tied into rafts or not, or loaded in boats or coracles or not, shall for the purpose of those rules be deemed to be timber in transit.

*Rule 3(ii):*In the case of timber, fuel, and bamboos from private lands, markets or depots in the District and in the case of subsequent movement of timber, fuel and bamboos, the permit shall be in the form of cart load or in Form II (lorry Load) as the case may be and shall be in print.

The permit shall, on application, be issued by the Range Officer having jurisdiction on payment of a fee calculated at the rates specified below:-

Form of permit	Fee.
Cart Load	Rs.1.00 each.
Form II (Lorry Load)	Rs.10.00 each.

No other permit shall be used.

Proviso: "Provided that Foresters may issue permits for removal of firewood from patta lands subject to the condition that they may issue such permits for not more than two cart loads at a time and not more than ten cart loads in a month in respect of the same individual, on production of Certificate of ownership of his patta land issued by appropriate revenue authority".

(G.O.Ms.No.1361, F.&F. dt.20.11.81 and G.O.Ms.No.971, F.&F. Dt.11.8.83.

Rule 7(4):-After the application for the removal of timber is received, the Asst. Conservator of Forests or the Ranger concerned shall, as soon as possible, inspect and, if the timber stored qualifies for issue of transport permit, affix the departmental hammer mark on the timber."

4. Consequent to these amendments

being effected, petitioners claim in spite of sufficient checks and verifications which could be made under the then existing rules which were reasonable, it had led to unreasonable restrictions imposed on their right to freedom of trade and carry on business. They are unwarranted, uncalled for, unjustified and unnecessary. Already, the timber handled by them bear their registration mark. Rules as framed, are prohibitive than regulatory, and therefore, Articles 301 to 304 of the Constitution of India are violated. In implementing the rules, which are inpracticable, innumerable difficulties are experienced and the delay and loss occasioning are the result of unreasonable restrictions imposed upon their right to carry on their trade. The insistence on hammer mark being affixed, at every stage, i.e., till the cut wood reaches the consumer, leads to considerable delay and an additional burden upon the traders. Hence, introduction of this additional stipulation being an unreasonable fetter on their right to trade. Article 19(1)(g) of the Constitution is contravened. The rules, as framed, are beyond the rule-making power of the Legislature under sections 35 and 36 of the Tamil Nadu Forests Act, 1882, henceforth shortly put as "Act". So, saw-mill owners, retail traders in timber, private owners of forests, contractors, persons who are involved in transit of timber etc., are petitioners in this batch of writ petitions. It is claimed that dependant upon the nature of business carried, they are concerned with trading in logs, cut-ups, trees fallen or have been felled, bamboos, firewood, timber slices, sawn timber wood in different forms, etc. By the increase in fees in issue of permits from 10 paise to Rs.10 there is no *quid pro quo* to services rendered, and it is unreasonably prohibitive and is intended to boost up the general revenues of the State, and hence illegal. As for forests owned privately, when trees are felled after securing permits as provided under Acts 22/49 and 17/55, and the said Acts having not provided for, any rules to be framed under the Forest Act cannot be made applicable in respect of such trees. Yet another contention taken is that, the word "subsequent" in rule 3(ii) is a legacy of the old rule and it was referable to subsequent movement of imported timber, and on the old rule having been deleted, the words "subsequent movement" cannot acquire a larger meaning, and be read as "every subsequent movement." In any event, neither rule 3(ii) nor Form II can be stretched to mean a permit being obtained for every movement of the sawn timber till the ultimate purchase is made by a consumer.

5. These points are countered by respondent State by claiming that rules have been validly made by virtue of sections 35 and 36, and that they are not prohibitive in nature but only regulatory, so as to preserve valuable forest wealth and to detect illicit removal of trees. Affixing of property mark, was for identifying the ownership of the timber, whereas the hammer mark is necessary for identifying its legal pronouncement. Wherever a tree, timber or forest produce, as defined under section 2 of the Act is found, the State has the right to find out whether its removal from the forest, was covered by valid pass issued under the Act or not. Hence, the process of checks, counter--checks and cross-checks being carried out, till manufactured articles are brought into existence, is necessary to prevent illicit removal of valuable trees from forests owned by State or privately. Hence, affixing of hammer mark in different stages, depending upon changing circumstances developing from time to time, cannot be termed as an unreasonable restraint on freedom on trade. 'The rules are applicable in respect of trees cut and removed under T.N. Acts 22/49 and 17/55, because they do not deal with the aspect of transit of trees and that the only apposite enactment is the T.N. Forest Act and the Rules framed thereunder. Though under the Act 'timber' as defined, and as admitted by the petitioner, will rope in several categories, for the purpose of Timber Transit Rules, certain categories have been exempted. Though all sawn timber could be covered under the Act, still, after discussions between the Chief Conservator of Forests and the Office Bearers of the Tamil Nadu Timber Merchants and Saw Mill Owners Federation, Madras, on 18.2.1981 and 10.9.1981, on their agreeing for the sizes to be specified,

the amendment rules were brought into existence exempting certain sizes for the purposes of the rules. Hence, the rules, as framed, are not beyond the provisions of the Act nor in any manner beyond the rule-making power of the State. Section 35(d) and (k) empower the Government to make the said rules, read with section 36. As far as private forests and trees which are covered by T.N. Act 17/55 are concerned, the permits issued, are not comprehensive, and hence for transit of such trees, and for proper identification to be made, it is necessary to affix hammer marks and to issue transit passes under the Act. As for increase in fees, even the rate now enforced is nominal, and that, while revising the cubit content of timber involved under each category had been taken into account, and furthermore, the claim that there is no *quid pro quo* is baseless. On the contention that the subsequent movement referred to in rule 3(ii) has become redundant consequent to the amendment cannot mean every subsequent movement till the timber reaches the consumer, it is stated that, unless and until manufactured articles came into existence so long as the product bears the character of a tree or timber, as defined under the Act, irrespective of the forms and shapes into which they may got into in different stages, the State has the right to verify their lawful origin, and hence even in respect of sawn timber, transported from point to point, a pass under Form II can be insisted upon.

6. I. Do sections 35 and 36 of the Act empower the Government to frame the impugned rules?

Mr.D.Raju, one of the learned counsel appearing for some of the petitioners, submits that the rules, as framed, are beyond the rule-making authority of the State of Tamil Nadu because under section 35, rules could be made only confined to certain local limits and not for the entire State. Furthermore, it is obligatory for the State to show that necessity exists for promulgating the rules. The scheme of the Act is referred to, for contending that more than one section exists in the Act to make rules, in contingencies contemplated for different categories, and hence, sections 35 and 36 will have to be construed strictly. By adverting to the scheme of the enactment it is pointed out that power is given to make the rules only in respect of certain categories mentioned in Chapter III. It is in Chapter V, sections 35 and 36 are found relating to "Control of Timber in Transit". Again relating to royalties, in Chapter VI-B, section 40-U confers additional powers on the Government to make rules generally to carry out the provisions of the Act. When distinct and separate sections exist for enacting rules, the usual contention that, what are found enumerated are only illustrative and not exhaustive, is not available. The expression 'local limit' assumes great significance in the context of what had been done prior to 1968, and hence, the rules as framed are void.

7. Learned Advocate-General, by referring to *Emperor v. Sibnath Banerji*, L.R.72 I.A.241= (1945)2 M.L.J.325= A.I.R.1945 P.C.156 and in turn to *S.K.Singh v. Shri V.V.Giri*, (1970)2 S.C.J.768= A.I.R.1970 S.C.2097: (1971)2 S.C.R.197 and *Om Prakash v. Union of India*, A.I.R.1971 S.C.771 submits that, what are found in sections 35(a) to (l) are only illustrative and not exhaustive, and the generality of the powers conferred under the Act to frame rules, to carry out the provisions of the Act, being available, section 35 does not prevent the State from making rules applicable to the entire State. The first sentence in section 35 being disjunctive, and when the expression "such rules may among other matters", would be equatable to the usual expression "without prejudice to the generality of the provisions", anything contained in the later portion is not intended to cut down the operative effect in the preceding portion of the section. As pointed out in *Om Prakash v. Union of India*, A.I.R.1971 S.C.771 it is a well established proposition of law that where a specific power in conferred without prejudice to the generality of the general powers already specified, the particular power is only illustrative and does not in any manner restrict the general power. Learned Advocate-General laboured to make out how disjunctiveness exists in the first sentence of section

35. What are enumerated in clauses (a) to (l) are only illustrative of the matters in respect of which, among other matters, rules could be made for such identifiable categories. The expression 'such rules may among other matters' clears the way for the construction to be put, that Government is empowered to make rules to regulate the transit of timber, as the circumstances may warrant in implementing the provisions of the Act. Section 63 has to be read along with section 35 in comprehending the extent of powers available to Government to make rules under the Act.

8. Contrasting with what are found in section 26, it was pleaded that framing rules districtwise is contemplated therein, and if such manner of framing of rules is contemplated under section 35, then the words would have been used. Petitioners contend that rules need not be districtwise but depending upon the nature of forest produce, the pattern of trade, manner of scrutiny and checks called for dependent on prevailing conditions in a particular area or locality, different rules will have to be framed, as may be found necessary, and therefore, framing of rules treating the whole State as if it is one locality, is illegal. It is on this aspect on behalf of the State, it is submitted that the expression 'local limits' would be referable only if rules are framed restricted to certain classes of timber, taking into account certain peculiar features. But, if the rules are of general nature applicable to any category of timber, then it is the earlier part of the section which will be applicable, in which event the aspect of necessity has no applicability. In short, it is submitted that the first sentence will have to be read disjunctively, and that the words "the Government may make rules to regulate the transit of all timber" empowers framing of such rules which could be applied for the whole State, and that it is only when circumstances warrant framing of different types of rules for certain classes of timber alone, then alone the later part being 'or of certain classes of timber as may appear to be necessary', would come into play.

9. When a tree is cut at one end of the State and transported to the other end of the State, it would be anomalous to think of different rules being made applicable, depending upon localities through which it passes, instead of uniform rules to be applied. It is only when necessity exists to limit the applicability of certain rules in respect of certain classes of timber within limited areas, the State is empowered to make such rules, so that it may not be contended that within certain local limits alone differential treatment cannot be applied. Hence, the later portion of this sentence, which envisages a different situation of peculiar nature, cannot be read in the manner done by petitioners as to take away the power of the State to make rules applicable to the entire State. When such statewide rules are made, no obligation rests on the State to show that necessity exists for framing them. Hence, the Tamil Nadu Timber Transit Rules, 1968, have been validly made under section 35(d) and (k) read with sections 36 and 63(c).

10. II. Has not Article 19 (1)(g) been contravened by the rules being amended consequent to G.O.Ms.Nos.1049 and 971?

Mr.V.P.Raman, learned counsel, who has led the other counsel appearing in these petitions, submits, that by amendments effected, the impugned rules had brought about a situation, wherein unreasonable restrictions are imposed, which are avoidable fetters, and which have no norms with the objects to be achieved under the Act. The Act having been passed for the protection and management of forests, after the trees are cut, removed and passed through forest checkposts, by issue of a Form II pass, thereafter, there is no need for any further regulatory measures to be taken in respect of the converted trees and timber. The rules, as they stood prior to the amendments by the said G.Os. sufficiently safeguarded the interests of the State, and to further the objects to be achieved under the Act, they being protection and management of forests. After timber leaves the forest areas, the authorities have no right to insist on any further verification to be made. Appearing on behalf of certain saw-mill owners, he submits that once

Form II is exchanged for Form III, and the timber is cut in the saw mills, they lose the characteristics of a forest produce or timber, as defined under the Act. The expression "subsequent" in rule 3(ii) is now being mis-interpreted to mean every subsequent stage of movement in respect of transferred timber, without understanding the circumstances under which the expression "subsequent movement" existed earlier to amendment in rule 3(ii). This part of the rule was referable to imported timber in rule 3(ii) as it originally stood, and hence, after the first stage of Form II pass gets exhausted while crossing the forest frontiers, again and again for every subsequent movement like from new mill to dealer or from one saw mill to another saw mill etc., the same form II type of passes, cannot be insisted upon. Once timber is sawn into different sizes, they would not fall within the ambit of timber as defined under the Act, and hence, the entirety of the rules cannot be applied to sawn timber. One of the letters of the Department dated 23.4.1980 is referred to for pleading that this is the manner in which the authorities understood the provisions of the Act and the Rules, and hence, the revised procedure now evolved results in harassment and intended for extraneous purposes. When applications are made, long delay ensures resulting in considerable loss to traders. Once registered property mark is affixed, there is no need to affix any hammer mark. When trees are cut under T.N. Acts 22/49 and 17/55, after careful scrutiny by a Committee which issues the permits, thereafter, any further insistence on securing a Form II pass is unwarranted, uncalled for, unjustified and an unnecessary check on transactions effected by traders. In implementing the rules, which are impractical, trades have experienced humiliation, harassment and suffered monetary loss. Experience hitherto clearly shows the ulterior motive in formulating the rules, which is well within the knowledge of respondents.

11. Timber is got from hill areas, private forests, reserved forests and from outside Tamil Nadu. In respect of the first two areas, under the provisions of T.N. Acts 17/55 and 22/49, the constituted Committees issue orders for felling trees. These two Acts do not provide for the manner and the conditions under which they could be transported from place to place. 'The Act' deals with timber derived from reserved forests also. When they are sold in auction, a pass in form I is issued by the duly authorised Officer for transporting them. When timber is brought from outside, a no-objection certificate is issued. As for timber secured under T.N. Acts 22/49 and 17/55, they will be dealt with separately hereunder. For the present, in respect of timber to be removed under Form I, no grievance is expressed. Even then, as far as saw mills and other traders are concerned it is claimed that after the timber is sawn in a saw mill, they lose the characteristics of timber, as defined in the Act. Furthermore, prior to the amendment of the rules "timber cut up and fashioned as manufactured articles" being one of the categories exempted, by substitution of rule 1-A (3)(b), in G.O.Ms.No.971 F.&F. dated 11.8.1983, an unworkable situation had been developed, and hence it is claimed that what appears to be an exemption is a mirage and no more.

12. Petitioners themselves state in their affidavit that timber cut up or fashioned as manufactured articles, timber removed under the concession granted under rule 7 of the General Rules under section 26 of the Act, small wood for fuel and bamboos and headloads of smaller quantities and firewood purchased from depots or markets for domestic consumption if transported within the municipal limits, under cover or invoice given by depot keepers are excluded and add by stating that, being an inclusive definition, it ropes in all other timber. Tree, timber and forest produce are defined under section 2 in the Act, as follows:

> "Timber includes trees when they have fallen or have been felled, and all wood, whether cut up or fashioned or hollowed out for any purpose or not;"
>
> " "Tree" includes stumps, bamboos and brushwood;"
>
> " "Forest Produce" includes the following things when found in, or brought from a Forest (that is to say):-

minerals (including limestone and laterite), surface soil, trees, timber, plants, grass. peat, canes, creepers, reeds fibres, leaves, moss, flowers, fruits, seeds, roots galls, spices, juice, catechu, bark, catechu gum, wood-oil, rosin, varnish, lac, charcoal, honey and wax's skins, tusks, bones and horns;"

Under the rules, 'timber' is defined as hereunder:-

"(3) "timber" includes all classes of timber as defined in the Act, except:-

(a) timber not grown in India

(b) all sawn timber where the smallest dimension is less than 5 c.m. in thickness and does not exceed 12 decimetres in length;

(c) timber removed under the concession granted in rule 7 of the general rules under section 26 of the Act,

(d) small wood for fuel and bamboos in head-leads or smaller quantities;

(e) firewood purchased from depots or markets for domestic consumption if transported within the municipal limits under cover of invoice given by depot keepers."

13. This definition shows that, for the purposes of the rules, only restricted categories of timber are taken into account. When all categories mentioned in section 2 could also be be covered, and which is an inclusive definition while making rules under section 35, and the necessary power to that effect having been already found to exist, it is for the petitioners to establish that the State ought to exempt more categories than what it has chosen to exempt. Nowhere it has been held that exempting certain categories tantamounts to an unreasonable restriction within the scope of Article 19. *South Gujarat Roofing Tiles v. Gujarat*, (1977)1 S.C.J. 397= (1976) Lab.I.C.1778= (1976)4 S.C.C.601= (1977)1 S.C.R.878: A.I.R.1977 S.C.90 is relied upon to counter the claim that an inclusive definition could only invariably mean a wider application, and that the word "includes" can also be used as one of limitation. In construing the scope of Entry 22 the word "includes" is generally used as a word of extension, but in Entry 22 it has been used in the sense of "means", which alone the said word can bear in the context in which it appears. In that view, it was not a word of extension, but limitation. No such peculiar circumstance is brought out to give restrictive meaning to the definitions of Tree, Timber and Forest Produce. Realising this position, the main onslaught is to claim that Form II requirement cannot be insisted, after the timber crosses Forest frontiers.

14. Merely because they cross the forest frontiers they would not cease to be timber till they get transferred into manufactured articles. The definitions of "saw" and "fashion" in Oxford dictionary are relied upon. •The definitions read as follows.

"Saw" (Verb)	To cut with a saw
"Saw"	1. A cutting tool consisting of a plate of metal (usually steel) one edge of which is forced into a continuous series of teeth... In the origional form of the tool represented by the HAND-SAW and in some varieties of more modern invention (e.g.) the pit saw the saw is moved backwards and forwards, each movement in one direction deepening the groove or "Korf" made in the wood or other material to be cut. In other varieties, as the circular saw and the band saw a continuous movement in one direction

is substituted for the reciprocating movement.

"Fashion" (Verb): To give fashion or shape to form, mould or shape. To give a specified shape to; to model according to, after or like something; to form into the shape of something, to shape into or to something."

So long as the inclusive definition of timber in the Act is to the effect that, even when wood is cut up or fashioned or hollowed out for any purpose or not, it would be timber, and merely because logs are cut in a saw mill, they would not cease to be timber for the purposes of the Act and the rules. It may assume different forms and shapes, but still, cut up wood so long as it does not partake the character of the categories which are exempted under rule 1-A, any movement from point to point, calls for verification by the authorities to find out their origin. This is why, under rule 3(ii) subsequent movements of timber, fuel and bamboo obtained from private lands, markets or depots will have to be covered by a Form II pass. If illicitly procured timber is sawn in saw mills or purchased by timber depots, and removed to different places inside the State, it would be impossible for the authorities to trace their illegal origin, unless the rugulatory measures as envisaged in the rules are enforced effectively and dutifully. The expression "protection and management of forests," in the context of the definition of timber in section 2, calls for sustained and continuing regulatory measures to be taken, till the concerned timber becomes a manufactured product. Hence, the requirement of a Form II pass for every movement of timber as prescribed under the rules being imperative in preventing illicit removal of trees, timber and forest produce etc., the alleged violation does not exist.

15. (1) Rights of those covered by T.N. Acts 22/49 and 17/55. On behalf of owners of private forests (Act 22/49) and owners of trees in areas covered by T.N. Act 17/55, it is claimed that after permits are secured from the Committees, and when the logs are numbered before granting such permission and the property mark is also affixed, thereafter it is superfluous to insist on issue of Form II pass and furthermore, in so far as these two enactments are concerned, no nexus exists in insisting on this requirement, to achieve the objects envisaged under the Acts. Mr.S.Sivasubramaniam, learned counsel, appearing for some of the petitioners, by referring to *R.D.Shetty v. International Air-port Authority*, (1979)2 Lab.L.J.217= (1979)3 S.C.C.489= A.I.R.1979 S.C.1628: (1979)2 S.C.W.R.210 pleads that the State will have to eschew arbitrariness in its actions, and while it is expected to act fairly and reasonably, it is imposing conditions which are restraints on free trade and if their main genuine intention is only to identify the origin of timber, the permit issued by the Committee (coupled with log numbers and registered mark of owner are adequate, and that hammer marking is redundant. It is further claimed that in issuing Form II not only considerable delay occasions for obvious reasons. As far as owners of private forests are concerned, they have the right to issue Form II passes and the authorities high-handedly choose to write them, and limit their duration to such a short period that it becomes impossible to remove the timber within the time granted. More than one counsel had pleaded harassment in the hands of authorities, and claimed that more restrictions have been imposed for the monetarily benefit the enforcing authorities rather than in public interest or to preserve the National wealth.

16. When the Committees issue permits under Act 22/49 or Act 17/55, they are only confined to felling of trees and not for removal of trees from the site where they were cut. Property mark affixed or log numbers put, have limited applicability. They indicate the ownership of the timber. They do not continue to maintain the same form and shape till converted into manufactured articles. There

are several intermediary stages in which they assume different forms and shapes. Hence, when they are being removed and there being no provision made under the said Acts regarding transit of these trees and the only enactment which cold apply being T.N.Act 5/82, their removal will have to be covered by Form II pass at every stage. Therefore, no insuperable or unreasonable demand is made on such owners in enabling them to issue Form II passes.

17. (2) Alleged non-adherence to Rules:- Though it was contended that authorities have been adopting a procedure which is not in accord with rules, on behalf of the respondent State, a supplemental-affidavit was filed by the Chief Conservator of Forests on 24.4.1984, stating therein the procedure followed in issue of Form II passes. In so far as timber, fuel and bamboos removed from private lands are concerned, Form II will be issued only by the owner and not by the authorities. All the entries will have to be filled up, only by the private owner. In the light of such an affidavit filed and the respondent State being bound by the same, there is no area of dispute existing, as to who would issue Form II pass under such circumstances.

18. (3) Time Limit in Rule 4(f) is unreasonable:- It is then pleaded that the other unreasonable stipulation is in the issue of forms restricted only to 30 days and for no longer period. Rule 4(f) prescribes that the permit shall be valid not exceeding a period of one month from the date of the issue of the permit. A person who requires Form II to be issued, will have to apply to the Range Officer under rule 4 (d) strictly in serial order. While the authorities supply printed forms in books, they make an endorsement at the top of the forms indicating the period within which they must be utilised. Petitioners claim that they must be granted at least a year's time to utilise the forms. Prescribing 30 days' time for utilisation, taking note of the nature of transactions involved and the type of trade, it cannot be claimed that any unreasonableness exists in fixing such a time limit under Rule 4(f) for utilisation of the forms. As and when the forms get exhausted or period granted had expired, then they can always secure additional books on showing to the authorities that they have the required stock, for which the forms are required. Some of the petitioners state that, without reference to the stocks on hand, taking note of the respective acquisitions to be made, the books should be issued. There is no substance in such a claim because, without necessary stocks on hand, there is no purpose in issuing sets of forms indiscriminately. Hence, by prescribing 30 days' time or by issuing forms in booklets with serial numbers; or in asking for return of the counterfoils of the permits if any supplied previously, and forms being issued by taking into account the stock position, no unreasonable restriction exists as to hamper the orderly functioning of this trade.

19. (4) *Hammer mark under Rule 7(4)*:- Yet another forcible plea raised in pleading unreasonableness relates to the requirement of affixing hammer marks. Mr.V.P.Raman, learned Counsel, contends that, when a Form II is issued and which has to be necessarily accompany the timber in lorries, alongside the registration marks affixed to timber, and having been once checked at the check-post and thereafter a Form III is issued; any further insistence on affixing hammer mark results in additional delay in completing sale transactions. Rules as framed are impracticable and the procedure envisaged cannot lead to or enable the authorities to make any precise verification, with whatever particulars they have noted at the check-posts. Except that it is cumbersene, nothing more could be its outcome. He submits that the State has failed to satisfactorily explain as to how and in what manner by insisting on hammer marks being affixed time to time, the so called illicit removals, could be detected. Hammer marks freshly put on sawn timber in saw mills, leads only to artocities being committed by authorities and not for preserving the Nation's wealth.

20. Respondents stated as follows: "It is submitted that it is not necessary that the petitioner should approach the departmental officials to get the hammer mark

affixed on sawn timber every now and then; but it is enough if they seek for affixing hammer mark for all the sawn timber lying in his depot at given times and when necessary." It is again stated, "It is submitted that the marking by affixing departmental hammer mark is necessary for identifying its legal procurement. Property marking is to indicate the ownership of the timber. So both the markings are necessary to regulate the transit of timber properly".

21. When a Committee grants the permit, the trees are numbered, and thereafter when the logs are cut into bits, the marks so affixed would not be available in all the cut pieces. As for the registered property marks, the same situation develops, when further cut in Saw Mills. Unauthorisedly when the owner affixes the property mark in illicitly cut trees, then at the check-posts, complete verification cannot be achieved, particularly when Form II passes are issued by owners themselves. Affixing of hammer mark, right from the site where the trees are cut, till they are converted into manufactured products, ensures that, only trees which have been permitted to be removed were being utilised in different stages, in different processes. The main intention in amending the rules is to prevent the large scale of illicit felling of trees, which is taking place to the detriment of National wealth. What is to be achieved under Article 48-A of the Constitution of India would be lost, if indiscriminate felling of trees is to take place, and regulatory measures are not meticulously taken at every stage of the movement of forest produce, till they are properly utilised. Rather, of all the marks, it is the hammer marks which assumes considerable importance in preventing illicit felling and removal of trees. On what is stated by the respondents in preceding paragraph, even on sawn timber, hammer marks can be conveniently affixed, so long as the owner is able to establish that his stocks are covered by valid permits and passes issued as required under law.

22. On behalf of the respondents it is stated that "on an average a Forest Guard and Forest Watcher are placed in charge of protective work and to carry out the provisions of the Tamil Nadu Forests Act, 1882, over an area of 5 to 7 thousand acres. It is well known that there are several paths, tracks and roads going in and out of the reserved forests and these two subordinates cannot exercise total control or carry out effective protection of the forest under their control nor the State could afford to employ more staff. Consequently, there are opportunities for pilferage, pooaching and smuggling by anti- social elements". It is further stated that forest defences have considerably increased and illegal exploitation of forest wealth, is ever on the increase. When such is the existing situation regarding control of forest produce, the stipulation for affixing hammer marks at every stage, is a move in the right direction to preserve the wealth of the Nation. Illicit and unauthorised removal of trees, if could be prevented by such and many mere regulatory measures, they could only be understood as aimed at disciplining the trade involved in exploitation of Forest wealth. Merely because such requirements call for maintenance of certain records or marks being affixed from time to time, which may result in such procedural requirements to be adhered to, they can never lead to holding that they are restraints on right to trade or coercion on freedom to carry on business.

23. (5) <u>Registration of Property Mark - Rules 7(1), (2) & (3) and 8:</u> On the requirement of affixing property mark, it is contended that once in a year, they are issued, taking into account the quantity for which certificate had been obtained; and if in the course of the year, the dealer had already sold away the permitted quantity, thereafter he is prevented from carrying on his trade. No factual details in support of this allegation had been placed before the Court. In any event learned Advocate-General had clearly stated that such a thing had not happened, and that Form IV issued under Rule 7, nowhere prevents the concerned dealer to secure registration, from time to time, for quantities which he intends to sell, irrespective of the year for which it had been issued. He states that if a certificate issued for a quantity mentioned in clause

3 therein is exhausted before 31st March of the concerned year, the dealer can always seek for further registration for such additional quantities for which he seeks a renewal in the same year. Hence, Rules 7(1) to (3) as framed and now in force, in no manner impose any unreasonable restriction on these who have to use property marks.

24. A plea is raised referring to the difficulties of consumers, to the effect that they cannot readily purchase, unless and until the trader had passed through a cumbersome procedure of no use to any one, and hence they are compelled to pay disproportionately to the real value of timber. Even very small pieces of wood, when bought in a timber depot, unless they bear the hammer mark, and satisfy the other requirements, cannot be readily purchased. Proviso to Rule 2 states that where timber is moved within the limits of a Municipality or a Corporation under invoice given by timber merchants, no permit is necessary for transport of such timber. As for the hammer marks, even when timber pieces leave the saw mills, the marks are affixed. Thereafter when they are sold, no difficulty could be experienced by a consumer, when he buys within Municipal towns or in Corporation areas; and when he moves timber from place to place inside these limits no pass in Form II is required. Therefore, the consumer is not in any way affected by the rules, so long as the movement is restricted within the permitted limits, under the proviso, to rule 2.

25. Yet another plea is that, every wooden piece has three dimensions and Rule 1-A(3)(b) by providing only for the thickness and the length, had made it unworkable. Respondents would state that when the thickness is furnished, it would mean 5 c.m. x 5 c.m. x 12 c.m. When the Federation itself had agreed on 18.2.1981 and 10.9.1981 in evolving the specification for sizes, and no reply affidavit having been filed repudiating this claim made at page 10 of the counter affidavit in W.P.No.9558 of 1983, this point is of no assistance to petitioners.

26. Apart from relying on Article 48-A, respondents advert to T.N.Act 29/49 under which timber was declared as an essential article and therefore, the rules, as framed, aim at imposing the necessary restrictions required to prevent illicit trade in timber. This is a relevant factor to be taken note of. That apart, learned Advocate-General by referring to *Pathumma v. State of Kerala*, (1978)2 S.C.C.1= A.I.R.1978 S.C. 771: (1978)2 S.C.R.537 would pertinently point out that Courts should take into account the increasing needs of the Nation, the burning problems of the day and the complex issues facing the people which require to be solved, and that the judicial approach should be dynamic rather than static, pragmatic rather than pedantic and elastic rather than rigid, and if so done, the Court would strike a just balance between the fundamental rights and the larger and broader interests of the Society. In *M/s. Laxmi Khadsari v. State of U.P.*, (1981)2 S.C.C.600= A.I.R.1981 S.C.873, it was held that, when violation of fundamental rights contained in Article 19(1)(g) is complained of, the onus is on the State to prove or justify that the restraints or restrictions imposed, are reasonable, and as to what are reasonable restrictions would naturally depend on the nature and circumstances of the case, the character of the statute, the object which it seeks to serve, the existing circumstances, the extent of the evil sought to be eradicated as also the nature of the restraint or restriction placed on the rights of the citizen. Restrictions may be partial, incomplete, permanent or temporary but they must bear a close nexus with the objects and the interests for which they are imposed, and they must be in public interest and done for striking a just balance between the deprivation of right and the danger or evil sought to be avoided. A Division Bench of the Allahabad High Court in *Mohd. Karrar Ali v. State of U.P.*, A.I.R.1954 All.753 in dealing with the validity of the U.P. Private Forests Protection Act, held that private owners having not been divested of any of their rights in forests, groves or trees, and when the restrictions imposed were to compel them to apply for permits before cutting, collecting and removing timber, which belongs to them and their right to transfer having been left intact,

and the nature of restrictions imposed on the exercise of ownership was in the larger public interest, and in turn when indiscriminate cutting down of trees would be controlled, it was held that the provisions of the Act were not unreasonable. A Division Bench of the Madhya Pradesh High Court had occasion to deal with the rules requiring permits for transit of timber framed under Indian Forests Act, and it was held in *V.L.Patel and Company v. State of M.P.*, A.I.R.1965 Madh. Pra.211 that, when the rules as framed are intended to subserve the aims of the Act which was meant to consolidate the law relating to the forest produce, the transit thereof and the duty leviable thereon; and hence those rules were meant to effectuate same or all of these objects. Having noticed the uphill task faced by the Government in preventing illicit felling of trees, over large extents with limited man power, and checking at check-posts at forest frontiers having been found to be insufficient, ineffective and being no match to the swift manner in which they are carried away by lorries; and on raids conducted in places like Mettupalayam, Tambaram and elsewhere large stocks of illicit timber having been found in saw-mills and with dealers, the impugned rules, which insist on a Form II pass to accompany during every movement of timber, and hammer mark being affixed on the transported timber, are absolutely necessary for the protection and management of forest wealth in the State of Tamil Nadu. Hence, the impugned rules are not violative of Article 19(1)(g).

27. III. Is the increase in fees under Rule 3 illegal and invalid? Petitioners claim that the fee now charged, has no relation to the service, if any rendered, and no *quid pro quo* is involved, and that the Department cannot recoup from the petitioners administrative charges of maintenance of the Department under the guise of license fee, and that general revenues cannot be augmented by increasing the licence fee, and that the onus is upon the State to justify the increase in licence fees. Reference is made to *Mica Industries Ltd. v. State of Bihar*, A.I.R.1971 S.C.1182: (1971) (Supp) S.C.R.319 to show that any amount spent for taking preventive actions cannot be collected from citizens, by way of fees. A careful reading of the said decision shows that it was a case in which the State by negligence failed to place the required materials before the High Court, and that resulted in the matter being remanded, giving a fresh opportunity to the State to place the required materials to show that what was collected had a reasonable correlationship of a general character for the service rendered by the Government. In *Southern Pharmeceuticals and Chemicals v. State of Kerala*, (1981) Tax.L.R.2838= A.I.R.1981 S.C.1863 it was held that the element of *quid pro quo stricte sense* is not always a *sine qua non* to a fee and that merely because supervisory staff is doubled, for its own protection to prevent leakage of revenue, it cannot be a denying of the fact that in turn the licensee undoubtedly receives the required services. In the counter-affidavit filed in W.P.No. 9558/83 in paragraphs 5 and 6, the relevant factors taken into account have been enumerated. It is seen that even as on date, the rate of 10 paise is retained provided the headload of 25-30 kilograms is carried, valued between Rs.10 and Rs.15. When a cart-load of 1/2 tonne to 3/4 tonne valued at Rs.150 to Rs.200 is carried, then one rupee is charged, since the quantity carried is ten times the value carried by headload. When a lorry load of an average of 8-10 tonnes is carried valued between Rs.2400 and Rs.3000, Rs.10 is charged. This by itself would suffice to show that the fee charged is extremely nominal, and the increase is in proportion to the value of the quantity removed and the extent of service required in checking them. Apart from this aspect, the rapid change which has occasioned in the mode of transport of timber which calls for mobilising patrolling operations in checking; the increase in price of timber per cubit foot, the increase in cost of supervision, as furnished, goes to show that fixation of fee, as prescribed, is just and reasonable. Rather, they appear to be nominal compared with the value of the goods being removed and the nature of supervision henceforth to be carried out under the impugned rules.

28. IV. Can those rules be made applica-

ble in respect of timber removed under the provisions of T.N.Acts 22/49 and 17/55?

T.N.Act 27/49 was passed to prevent the indiscriminate destruction of private forests and for interfering with customary and prescriptive rights therein and for certain other purposes. T.N. Act 17/55 was enacted for regulating the cutting of trees and the cultivation of lands in hill areas in the State of Tamil Nadu. Under these two enactments, no provision is made regarding transit of trees permitted to be cut, on permission granted by constituted Committees. A careful reading of these enactments goes to show that they deal only with preservation of forests covered by the Acts and regarding constitution of Committees and the powers to be exercised, and as to what penalties could be imposed for contravention of the provisions of the Acts. Section 10 of the Act 27/49 and section 12 of Act 17/55 which deal with power to make rules by the Government, do not provide for any rules to be framed regarding transit of timber cut under the provisions of the said enactments. Therefore, consequent to permits secured under the said enactments, when timber is cut and removed from the site, they would come within the folds of the definition of timber under T.N. Act 3/1882, read with the Timber Transit Rules.

29. V. Do the impugned rules interfere with the freedom of trade, commerce and intercourse guaranteed under Article 301?

Petitioners contend that under Article 302 only Parliament can impose restrictions on trade, commerce and intercourse between one State and another or within any part of the territory of India and when Article 304(b) confers power on the State Legislature to make a law imposing reasonable restrictions on freedom of trade, commerce or intercourse without or within the State in public interest, after the previous sanction of the President of India, and such a condition precedent having not been complied with, and the rules having been made by the executive Government, and not by the State Legislature, they are illegal. Mr.D.Raju, learned counsel for some of the petitioners, in strenuously advancing this point relied upon *State of Mysore v. H.Sanjeeviah*, (1967)2 S.C.J.313= A.I.R.1967 S.C.1189: (1967)2 S.C.R.361 wherein it was held that the two provisos to rule 2 of the Transit Rules framed under Mysore Forest Act are restrictive in nature, and they having not been made by the Legislature of that State, but by the executive Government in exercise of delegated authority, Article 304 being an exception to Article 301, the impugned provisos therein were invalid. By referring to *The Dist. Collector of Hyderabad v. Ibrahim and Company*, (1970)2 S.C.J.609= (1970)2 M.L.J. (S.C.)109= (1970)2 An.W.R. (S.C.) 109= A.I.R.1970 S.C.1275: (1970)3 S.C.R.498 it is pleaded that the guarantee under Article 301 cannot be taken away by executive action and being subject to certain restrictions specified in Articles 302 to 305, it would be impossible to hold that the State by executive order can do something which it is incompetent to do by legislation. His endeavour is to show that the State Government being fully aware that it cannot secure the sanction of the President, if the Act is to be amended incorporating those restrictions, had resorted to framing of impugned rules under sections 35 and 36 of the Act.

30. Learned Advocate-General relying upon *Automobile Transport Ltd. v. State of Rajasthan*, (1963)1 S.C.R.491= A.I.R.1962 S.C.1406 advances the proposition that Articles 301 and 304(b) would come into play, only if the rules are restrictive in nature, and if they are regulatory and facilitate trade and commerce then the point, as raised, does not require any consideration. It was held therein that the word "free" in Article 301 cannot mean freedom to do whatever one wants to do, but if what are prescribed are regulatory in nature, then the said Articles are not violated. It is the reality or substance of the matter that has to be determined and the freedom postulated by Article 301 must be understood in the context of an orderly society, recognising the need and the legitimacy of some degree of regulatory control being imposed. Hence, if regulatory measures are ushered in, then they are not hit by the freedom

declared by Article 301. In *Narendra Kumar and others v. The Union of India and others*, (1960) S.C.J.214= A.I.R.1960 S.C.430: (1960)2 S.C.R.375 it was held that the test of reasonableness is applied by considering the question in the background of the facts and circumstances under which the rules were made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, the beneficial act reasonably expected to result to the general public and whether the restraint caused by the law was more than was necessary in the interests of the general public. In *Kasi Prasad v. State of Orissa*, A.I.R.1963 Orissa 24 a Division Bench held that the Orissa Timber and Forest Produce Transit Rules framed under Forest Act, 1927, contain only regulatory measures relating to movement of forest produce even though the produce may not be the property of the Government. Reliance was also placed on Article 305 to hold that, though the rules were made in 1958, they were framed under section 41 of a pre-Constitution enactment, and hence by virtue of Article 305, an existing law is saved from the operation of Article 301. This aspect is also apposite, as far as 'the rules' are concerned. Reference is then made to *State of Tamil Nadu v. M/s.Hind Stone*, (1981)2 S.C.C.205= (1981)2 S.C.R.742= A.I.R.1981 S.C.711 for contending that, if an Act is enacted for the purpose of regulating a particular type of industry, then such an Act and the rules made thereunder are outside the purview of Article 301, and on this basis, construing that the Mines and Minerals (Regulation and Development) Act was enacted as a regulatory measure, rule 8(c) of Tamil Nadu Mineral Concession Rules, was upheld. Forest Act was enacted for the protection and management of the forests in the State of Tamil Nadu. It deals with forest wealth found in reserved forests and for preservation and their protection in any forest land not in the control of the Government, and under Chapter V the Government is authorised to make rules to regulate the transit of all timber. Alongside this Act, T.N. Acts 22/49 and 17/55 having been enacted, and the main purpose in framing the rules being "to regulate transit of timber in the State of Tamil Nadu" they do not bring about any restrictions, but only regulate the movement of timber on complying with certain requirements pertaining to verification of timber right from the stage of cutting of trees upto final utilisation. He also relies upon Writ Appeals Nos.579 to 591 of 1983 wherein the validity of clause 3(1)(a) of Tamil Nadu Paddy (Restriction of Movement) Order, 1982, came up for consideration and which was held to be regulatory in nature, and hence stood excluded by Articles 301 to 304.

31. Section 35(d) of the Act empowers the Government to make rules providing for the stoppage, reporting, examination and marking of timber in transit, and section 35(k) enables rules being made to regulate the use of property marks for timber and the registration of such marks. Under the Act, the said power having been specifically provided for, the rules as framed, come into existence by exercise of the statutory powers conferred on the Government under the Act. Therefore, the contention that for enforcing these regulatory measures, the Act itself ought to have been amended by satisfying the requirements contemplated under proviso to Article 304(b), carries no substance. In *State of Mysore v. Sanjeeviah*, (1967)2 S.C.J.313= A.I.R.1967 S.C. 1189: (1967)2 S.C.R.361 it was held that the two impugned provisos to Rule 2 were restrictive in character, whereas the impugned rules are regulatory in nature. Though Mr. Raju, learned counsel, while referring to paragraph 8 therein would plead that if the rules are made by the executive Government in exercise of delegated authority, it would have the force of law, and that Article 301 could be invoked, it is stated therein that the impugned provisos, do not become part of the Act by virtue of section 77 of the Mysore Forest Act. If only the impugned rules in these petitions are found to be restrictive, then irrespective of the fact that they have been framed under section 35 of the Act, they could be held as offending Article 301. By resorting to rule making power, the freedom guaranteed under Article 301 cannot be bypassed.

But, once the rules are held to be regulatory in nature, this point advanced by him does not nullify the rules. As to what is the scope, the controlling circumstances which impelled the introduction of the amendments, the evil to be eradicated, and the object to be achieved, have already been considered in the proceeding paragraphs and they clearly show that the Rules are only regulatory in nature. By securing the hammer mark, and a Form II pass, it enables the certified timber being moved from point to point without hindrance or delay, which may occur if the owner is to satisfy authorities otherwise about lawful procurement, at every stage, till manufactured articles come into existence. Hence, the impugned rules are not hit by Articles 301 and 304(b).

32. In some of these petitions, certain Associations have also been impleaded as petitioners, but Counsel appearing in these petitions state that as individual dealers, who are members of these Associations are also impleaded as petitioners in these petitions, the impleaded Associations are given up for the purposes of these petitions, and hence, the writ petitions are to be disposed of as if filed only on behalf of the individual petitioners named in the writ petitions.

33. In the result, the writ petitions are dismissed with costs fixed at Rs.250/- to be paid by each of the petitioners in these writ petitions.

---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and Shanmukham, JJ.*

*W.A.No.271 of 1983.

11th September, 1984.

Fathima Automobiles *Appellant**

v.

P.K.P.Nair and others *Respondents.*

(A) Tamil Nadu Buildings (Lease and Rent Control Act (18 of 1960), sections 18 and 23 - Execution of an order of eviction obtained - Removal of obstruction by invoking procedure under the Civil Procedure Code - Separate suit by obstructor not maintainable.

(B) Civil Procedure Code (V of 1908), Order 21, rules 97 and 101 as amended by Act (104 of 1976) - Applicablity.

On the question whether an obstructor to an order for delivery of possession in execution of a Rent Control eviction order can contend that he is not claiming only rights under the tenants but independently from person claiming to be the owner and on dismissal of his writ petition with an observation that he could file a suit,

Held:- In this case the appellant has a right to appeal under section 23(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act against the order impugned in the writ petition directing removal of obstruction which is an order not passed under section 18(1), but one passed under Order 21, rule 97, Civil Procedure Code. Since the petitioner has a right of appeal, the Court cannot in exercise of the extraordinary jurisdiction go into the merits of rival contentions urged by the parties in the writ appeal. Even now the appellant is at liberty to file an appeal under section 23(1)(b) of the Act against the order impugned in the writ petition with a petition under section 5 of the Limitation Act to condone the delay in filing the same and if such a petition

for condonation of the delay is filed, the time taken by the appellant in prosecuting the writ petition and writ appeal would naturally stand excluded. After the Amending Act 104 of 1976 was passed the executing Court before which an application is filed for removal of obstruction has to decide all questions arising between the parties viz., the decree-holder and the obstructor and no separate suit will lie for the purpose of deciding the dispute between the decree-holder and the obstructor. Having regard to the specific and express provisions contained in Rule 101 of Order 21, Civil Procedure Code that against an order of removing or refusing to remove obstruction, a separate suit is not maintainable, all the questions arising between the parties to the application for removal of obstruction have to be decided by the executing Court itself as that court has been conferred a specific power to decide all questions arising between the parties while disposing of the application for removal of obstruction.

[Para.3]

A.Ramanathan, for K.G.Ahmed, for Appellant.

S.V.Jayaraman, for M.A.Srinivasan, for Respondents.

The Order of the Court was made by

Ramanujam, J.:- This writ appeal is directed against the order of Mohan, J. in W.P.No.7351 of 1981, dismissing the writ petition filed by the appellant on the ground that the appellant has got a right of suit against the order, dated 26th August, 1981, passed by the Rent Controller in W.P.No.943 of 1980 in E.P.No.762 of 1980 in H.R.C.No.986 of 1977 on the file of the Small Cause Court, Madras.

2. The circumstances under which the said writ petition came to be filed before this court may be briefly stated. The first respondent herein had obtained an order of eviction against his tenants in H.R.C. No.986 of 1977. In those proceedings, there was no resistance at all on the part of the tenants. However, the appellant herein obstructed delivery of possession and therefore, the first respondent filed an application for removal of obstruction contending that he is not one claiming any rights under the tenants against whom the order of eviction has been passed, that he is claiming independent right through one Dhanabagyammal, who is claiming to be the owner of the premises. The Rent Controller after taking evidence with reference to the relative contentions of parties ordered removal of obstruction. It is as against that order the writ petition came to be filed. Mohan, J. before whom the writ petition came up for final hearing passed the following order:-

> "The matter arises under execution proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. If really the petitioner was not a party to the eviction order, it need not worry at all. It can always protect its right by means of a separate suit for declaration of the tenancy rights. In this view, I do not propose to interfere with the order. The Writ petition is dismissed. No costs."

Taking note of the order passed by Mohan, J. the appellant has filed a suit questioning the order passed by the Rent Controller removing obstruction. He has also filed this writ appeal against the said order of Mohan, J.

3. Before us, learned counsel for the appellant submits that though the appellant has filed a suit questioning the order of the Rent Controller directing removal of obstruction, since the question as to whether a suit will lie after Order 21, rule 101 has been amended by the Amending Act of 1976, is a moot point, the appellant has filed the appeal seeking a ruling on the question as to whether the suit could be maintained against an order of the execution court directing removal of obstruction. It is significant to note that Mohan, J. who disposed of the writ petition has not gone into the merits of the rival contentions as to whether the order for removing obstruction could be justified on merits or not. The learned Judge has merely proceeded on the basis that since the appellant has got a remedy by way of suit, the order for removing obstruction passed by the Rent Controller does not call for

interference. Having regard to the order passed by the learned Judge which is under appeal, the question that arises for consideration by us is what is the remedy available to the appellant as against the order passed against him by the Rent Controller removing obstruction? The matter has to be looked at in the context of the provisions of Order 21, rule 97 read with rule 101 of the C.P.C. and sections 18 and 23 of the Tamil Nadu Buildings (Lease and Rent Control Act), 1960 (hereinafter called the Act). Order 21, rule 97(1), C.P.C. provides that where the decree-holder or the purchaser of any property sold in court auction, is resisted or obstructed by any person, in obtaining possession of the property, the decree-holder or the auction purchaser may make an application to the Court complaining of such resistance or obstruction. Rule 97(2) enables the Court to adjudicate upon such an application for removal of obstruction in accordance with the provisions contained in Order 21, rule 101, as amended by Act 104 of 1976 which lays down that all questions arising between the parties to an application under rule 97 shall be determined by the executing court dealing with the application and not by a separate suit, and for this purpose the executing court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. Thus, after the Amending Act 104 of 1976 was passed, the executing court before which an application is filed for removal of obstruction has to decide all questions arising between the parties, *viz.*, the decree-holder and the obstructor and no separate suit will lie for the purpose of deciding the dispute between the decree-holder and the obstructor. Having regard to the specific and express provision contained in rule 101 of Order 21, C.P.C. that against an order of removing or refusing to remove obstruction, a separate suit is not maintainable, all the questions arising between the parties to the application for removal of obstruction have to be decided by the executing court itself as that court has been conferred a specific power to decide all the questions arising between the parties while disposing of the application for removal of obstruction. Therefore, we are not in a position to agree with the view taken by Mohan, J. to the effect that a suit is maintainable in this case by the appellant who is an obstructor against whom an order of removing obstruction has been passed. It is relevant to note that even the lower court in this case has chosen to decide the issue arising between the parties in an application under rule 97 taking note of the power conferred on it under rule 101 of Order 21 to decide all the disputes between the parties to the application before it.

4. If a separate suit does not lie in respect of an order passed under Order 21, rule 97, C.P.C. the question arises as to what is the other remedy that is open to the appellant. In this connection, reference has to be made to section 18 of the Act. Section 18 runs thus:-

> "*Execution of orders*:- (1) Every order made under sections 10, 14, 15, 16 and 17 and every order passed on appeal under section 23 or on revision under section 25 shall be executed by the Controller as if such an order is an order of a civil court and for this purpose the Controller shall have the powers of a civil court.
>
> (2) An order passed in execution under sub-section (1) shall not be subject to any appeal or revision."

Section 18 of the Act provides that every order made under sections 10,14,15,16 and 17 and every order passed on appeal under section 23 or on revision under section 25, shall be executed by the Controller, as if such order is an order of a civil court and for this purpose the Controller shall have all the powers of a civil court. Sub-section 2 says that an order passed in execution under section 18(1) shall not be subject to any appeal or revision. The object of section 18(2) is to see that unlike an order of eviction which could be subject to appeal under section 23 or revision under section 25, no appeal or revision would lie against an order passed under the section directing

delivery in execution under sub-section (1) of Section 18 of the Act. Section 23 of the Act provides for an appeal to an Appellate Authority constituted under the Act against any order passed by the Rent Controller. It is significant to note that section 23 does not refer to an order passed under sections 10,14,15,16 and 17. Thus, a close reading of Section 18 and section 23 indicates that there may be orders passed by the Rent Controller which may not fall within section 18(1) and that those orders may be subject to appeal under section 23 of the Act. It is further significant to note that section 23 (1)(b) confers right of appeal to 'any person aggrieved' by an order passed by the Controller. The use of the expression 'any person' in section 23(1)(b) seems to suggest that it is not only the parties to the eviction order but also persons affected by any order passed by the Rent Controller could file an appeal. If the filing of the appeal under section 23 is contemplated only by the parties to the eviction proceedings, then the Legislature would have used the words 'any party aggrieved' instead of 'any person aggrieved'. The use of the general expression like 'person' would indicate that, as already stated, an appeal could be maintained not only by a party to the eviction proceeding but also by a person who feels aggrieved by any order passed by the Controller. In this case, the executing Court has passed an order directing the tenants to deliver possession of the property in pursuance of the order of eviction. That order alone can be taken to be an order passed under section 18(1). Subsequent to such an order the appellant herein has obstructed the delivery and an application under Order 21, rule 97, C.P.C. has been filed, and an order has been passed by the Rent Controller on that application. The order passed by the Rent Controller in an application under Order 21, rule 97 cannot, in our view, be taken to be an order passed under section 18(1) of the Act. That should be taken to be an independent order passed under the Civil Procedure Code and not under the Rent Control Act. Though the order is actually passed by the Rent Controller in an application under Order 21, rule 97, C.P.C. that should be taken to have been passed by him in exercise of the powers of a civil court as provided in section 18(1) of the Act. We are not therefore in a position to construe the order passed by the Rent Controller in an application under Order 21, rule 97, C.P.C. as an order passed by the Rent Controller under section 18(1) so that the bar under section 18(2) could be invoked. Section 18(2) bars an appeal or revision only in respect of an order passed in execution under sub-section (1). But that section will not be a bar for an appeal or revision being filed against an order passed in exercise of the power under Order 21, rule 97, C.P.C. If there is no bar for an appeal or revision under section 18(2) then the next question that will arise is as to whether an appeal is available to the appellant in this case. As already stated, section 23 of the Act providing for an appeal is comprehensive in nature and is not restricted to orders passed by the Rent Controller under sections 10,14,15,16 and 17. As already stated section 23(1)(b) talks of any person aggrieved filing appeal, as also any order passed. Since section 23(1)(b) does not refer to an order passed by the Rent Controller under section 18(1) we have to hold that any order passed by the Rent Controller against which a person is aggrieved can be taken in appeal by that aggrieved person under section 23(1)(b) of the Act. Thus, in our view, section 23(1)(b) enables any person aggrieved by an order passed by the Rent Controller to file appeal and it is not possible to restrict application of section 23(1)(b) as applying only to parties to the eviction proceedings and to orders passed by the Rent Controller in exercise of the power of eviction under section 18(1) of the Act. In this view of the matter, we have to hold that under section 23 (1)(b) of the Act an obstructor who is aggrieved against an order directing removal of obstruction passed by the Rent Controller could file an appeal under that section and the bar contained in section 18(2) will not apply to such an order. We have to hold that in this case the appellant has a right to appeal under section 23(1)(b) of the Act against the order impugned in the writ petition directing removal of obstruction which is an order not passed under section 18(1), but one passed under

Order 21, rule 97,, C.P.C. Since the petitioner has got a right of appeal, we cannot in exercise of the extraordinary jurisdiction go into the merits of the rival contentions urged by the parties in this writ appeal. Even now the appellant is at liberty to file an appeal under section 23(i)(b) of the Act against the order impugned in writ petition, with a petition under section 5 of the Limitation Act to condone the delay in filing the same and if such a petition for condonation of delay is filed, the time taken by the appellant in prosecuting the writ petition and the writ appeal before this Court would naturally stand excluded. With this observation, the writ appeal is dismissed. There will be no order as to costs.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *T.Sathiadev, J.*

*C.R.P.No.5110 of 1983. *21st February,* 1984.

Marappa Gounder and others *Petitioners**

v.

Sellappa Gounder and others *Respondents.*

(A) Civil Procedure Code (V of 1908), Order 18, rule 3-A - Scope - Examination of a party in suit - Procedure - Proper practice pointed out.

(B) Evidence Act (I of 1872), section 135 and Civil Procedure Code (V of 1908), Order 18, rule 3-A - Scope.

(C) Civil Procedure Code (V of 1908), section 115 - Order passed under Order 18, rule 3-A - Revision whether maintainable.

Under section 135 of the Evidence Act, the order in which witnesses are produced or examined shall be regulated by the law and practice for the time being in force relating to Civil and Criminal Procedure, respectively and in the absence of any law, by the discretion of the Court. When a specific provision had been introduced by an Amendment Act, based on the recommendations of the Law Commission, to undo an existing mischief which stands in the way of proper administration of justice the importance of the rule cannot be got over, by allowing trial Courts to persist in the same old procedure, merely because it is held to be directory. When the rule contemplates permission to be granted by Court for a party to a proceeding to be examined at a later stage, it is indicative that there is no total ban against parties being examined after their witnesses are put in the witness box. That is why, in the decisions it has been held, that the rule is directory in nature. This would not mean that the rule could be transgressed indiscriminately in an unbridled manner.

A duty is cast on the Court to record reasons, which means that valid and compulsive grounds must be made out, for postponing the examination of parties to the suit. If a party to the suit desires to be examined later on, he should seek prior permission before the other witnesses are examined. It can be sought even later on at the time when the party is put in the witness box, if by mischance any of his witnesses have been already examined, without securing earlier permission. Whenever permission is sought for, it is obligatory on the part of the Court to record reasons by passing a written order, either granting or refusing leave. If permission is sought in the initial stage before any witness is examined, then reasons to be given should relate to the justifiable inability on the part of the party to first examine himself. Before granting permission it should bear the objections, if any, of the other side, and then alone permit any witness of the party to be examined. In such of those cases wherein without prior permission witnesses of the party had been examined, and later on the party wishes to appear as a witness, the Court is duty bound to find out, whether on the party being examined at that stage, it would result in filling up any blanks or lacunae left out in the evidence already given and whether wantonly he avoided the witness box with ulterior motives, and whether he was placed in such a situation or circumstance which had disabled him from being examined earlier. Unless strong compelling circumstances which are relevant and germane had existed, permission to a party to a proceeding to examine himself after his witnesses had been examined, out not to be granted. The intention of Parliament in enacting the rule, which had come into existence on the recommendation made by the Law Commission had resulted in a revised procedure being evolved, according to which a Court has to record reasons mentioning the circumstances which it takes into consideration for granting permission. Failure to give valid reasons, would vitiate the order and the evidence recorded without permission cannot be treated as part of the records in the suit. The most desirable and healthy practice required to be followed by trial Courts is to call upon parties to the suit, as soon as the suit is posted for trial, to file memos into Court, stating as to whether they intend to be examined or not. If only trial Courts resort to this practice, it would result in proper compliance of Rule 3-A, and the notorious mal-practice indulged in would come to an end. A suitable amendment in the Civil Rules of Practice to this effect, would bring about uniformity of procedure in the trial Courts in this State. *[Paras.4,5,6]*

On orders passed under rule 3-A of Order 18, a Civil Revision Petition will lie to the High Court, which will have to be scrutinised to find out what the reasons were which prevailed for granting permission. If oral permission is granted, the reasons which prevailed upon the trial Court would be unknown, and in turn parties would suffer. When the rule itself implies a duty to record reasons, no other method is permissible. *[Para.10]*

Cases referred to:-

State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) Crl.L.J.1581= (1982)2 S.C.C. 463= (1982) S.C.C. (Crl.) 478= A.I.R.1982 S.C.1249; *Smt. Gurdial Singh v. Pyara Singh*, A.I.R.1962 Punjab 180; *Bholanath Mondal v. Kalipada Mondal*, A.I.R.1981 Cal.295; *Kwality Restaurant v. Satinder Khanna*, A.I.R.1979 Punjab 72.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Bhavani dated 20.7.1983, and made in I.A.No.1067 of 1983 in O.S.No.58/81.

S.Gopalaratnam, for Petitioners.

M.Sivamani, for Respondents.

The Court made the following

ORDER:- Defendants are Petitioners. Respondents who are Plaintiffs filed O.S.No.58 of 1981 on the file of the District Munsif's Court, Bhavani, for a declaration that they are entitled to irrigate their lands through the suit channel, and to restrian defendants from interfering with their right of irrigation, by way of an

injunction. Written statement was filed on 10.11.1982, and issues were framed on 2.3.1983. The suit was taken up for trial on 28.6.1983, and adjourned to 14.7.1983, on which date, instead of any of the plaintiffs being examined, one of their vendors was examined as P.W.1. On 15.7.1983, Exs.A-1 to A-3 were marked and P.W.1 was examined on 16th, 18th and 19th of July, 1983. On coming to know that plaintiffs were arranging to put one of the plaintiffs in the box for examination, I.A.No.1067 of 1983 was filed under Order XVIII, rule 3-A and section 151 of the Code of Civil Procedure, to pass an order prohibiting the examination of any of the plaintiffs in the suit. The trial Court dismissed the application holding that, when the suit was opened on 14.7.1963, counsel for plaintiffs sought oral permission to examine the vendor of the suit property, and that, on 15.7.1983 a joint memo was filed for joint trial of O.S.No.58 of 1981 with O.S.No.1243 of 1981, which was instituted by the sixth defendant, and therefore, the petition was devoid of merits, and hence dismissed it as not maintainable.

2. Mr.S.Gopalaratnam, learned counsel for defendants, submits that, when rule 3-A of Order XVIII, C.P.C. had been introduced under Amending Act 104 of 1976 to prevent this "persistent notorious mal-practice indulged in by litigants bordering on dishonesty", the trial Court had overlooked the intendment behind the rule, and had light-heartedly dismissed the application. The claim made that oral permission was sought is also disputed.

3. On behalf of plaintiffs, Mr.N.Sivamani, learned Counsel, would first submit that, when a statement is made by Court in its order as to what has transpired in the proceedings, thereafter, no party to a proceeding can dispute it, in view of the decision rendered in *State of Maharashtra v. Ramnad Shrinivas Nayak*, (1982) Crl. L.J. 1581= (1982)2 S.C.C.463= (1982) S.C.C. (Crl.) 478= A.I.R.1982 S.C.1249. It was held therein that, "If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject." He then relies upon the decision in *Smt. Gurdial Kaur v. Pyara Singh*, A.I.R.1962 Punjab 180, but it dealt with only Rules 1 and 2 of Order 18, C.P.C. and the undesirable pratice which had developed and was in vogue in the State of Punjab, of parties coming into the witness box at the end of their evidence, so as to fill up any blanks or lacunae in the evidence, and hence held as not conducive to better administration of justice. He then relied upon the decision in *Bholanath v. Kalipada*, A.I.R.1981 Calcutta 295, wherein it was held, that rule 3-A is directory, and that after other witnessess are examined, permission can be granted to a party to a proceeding to be examined. In the decision in *Kwality Restaurant v. Satindar Khanna*, A.I.R.1979 P. & H.72 (D.B), it was held that a party may, perhaps, as a matter of abundant caution, apply at the stage of commencing his evidence and get the necessary permission, and equally, if sufficient ground is made out, he may secure such permission at a later stage also.

4. As pointed out by Mr. S.Gopalaratnam, learned counsel for defendants, under section 135 of Evidence Act, the order in which witnesses are produced or examined shall be regulated by the law and practice for the time in force relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the Court. When a specific provision had been introduced by an Amendment Act, based on the recommendations of the Law Commission, to undo an existing mischief which stands in the way of proper administration of justice the importance of the rule cannot be got over, by allowing trial Courts to persist in the same old procedure, merely because it is held to be directory.

5. When the rule contemplates permission to be granted by Court for a party to a proceeding to be examined at a later stage, it is indicative that there is no total ban against parties being examined after their witnesses are put in the witness box. That was why, in the decisions above referred to, it was held, that the rule is directory in nature. This would not mean that the rule could be transgressed indiscriminately in an unbridled manner.

A duty is cast on the Court to record reasons, which means that valid and compulsive grounds must be made out, for postponing the examination of parties to the suit. If a party to the suit desires to be examined later on, he should seek prior permission before the other witnesses are examined. In its absence, it can be sought later on at the time when the party is put in the witness box, if by mischance any of his witnesses have been already examined, without securing earlier permission. Whenever permisssion is sought for, it is obligatory on the part of Court to record reasons, by passing a written order, either granting or refusing it. If permission is sought in the initial stage before any witness is examined, then reasons to be given should relate to the justifiable inability on the part of the party to first examine himself. Before granting permission, it should hear the objections, if any, of the other side, and then alone permit any witness of the party to be examined.

6. In such of these cases wherein without prior permission witnesses of the party had been examined, and later on the party wishes to appear as a witness, the Court is duty bound to find out, whether on the party being examined at that stage, it would result in filling up any blanks or lacunae left out in the evidence already given, and whether wantonly be avoided the witness box with ulterior motives, and whether he was placed in such a situation or circumstances which had disabled him from being examined earlier etc. Unless compelling strong circumstances which are relevant and germane had existed, permission to a party to a proceeding to examine himself after his witnesses had been examined, ought not to be granted. The intention of Parliament in enacting the rule, which had come into existence on the recommendation made by Law Commission, had resulted in a revised procedure being evolved, according to which a Court has to record reasons mentioning the circumstances which it takes into consideration for granting permission. Failure to give valid reasons, would vitiate the order, and the evidence recorded without permission, cannot be treated as part of the records in the suit. The most desirable and the healthy practice required to be followed by trial Courts is to call upon parties to the suit, as soon as the suit is posted for trial, to file memos into Court stating as to whether they intend to be examined or not. If only trial Courts resort to this practice, it would result in proper compliance of rule 3-A, and the notorious mal-practice indulged in would come to an end. A suitable amendment in the Civil Rules of Practice to this effect, would bring about uniformity of procedure in the trial Courts in this State.

7. On the finding given that the application was not maintainable, it is needless to state that this is obviously and patently an errorneous finding. The application as filed, is contemplated under C.P.C. and a party to a proceeding can invoke rule 3-A of Order 16, under such circumstances.

8. The other ground relied upon is that, another suit filed by sixth defendant, wherein he was the first plaintiff, viz., O.S.No.1243 of 1981 was to be tried jointly along with this suit (O.S.No.58 of 1981). Prior to the memo filed to this effect O.S.No.58 of 1981 having been already taken up for recording oral evidence, subsequent development would not make the petition filed, as a petition devoid of merits. This is yet another error committed by trial Court.

9. The next point taken is that, plaintiffs' side had sought for oral permission to examine the vendor of the suit property. In the light of the decision rendered in *State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) Crl.L.J.1581= (1982)2 S.C.C.463= A.I.R.1982 S.C.1249, this statement has to be taken as binding upon defendants. But, still this does not satisfy the requirements of rule 3-A, because as to what were the reasons that prevailed upon the Court to grant permission, are not spelt out in this Order. It is not claimed that while granting oral permission reasons were enumerated and disclosed to parties. When rule 3-A contemplates that reasons must be recorded, it is undesirable for a Court to proceed on oral permission, and much worse, if such a permission had been granted without

reasons. Vendor of a suit property is a competent witness, cannot be a valid circumstance to permit him to be examined earlier to the plaintiffs. It is not stated in the order as to what urgent or compelling or unavoidable circumstances existed, to prevent such of those plaintiffs, who wished to appear as witnesses, from being examined at first. Hence, when the 'B' Diary called for does not disclose any reasons having been granted on 14-7-1983, the decision to permit P.W.1 to be examined on that day, was the outcome of a permission granted without reasons, and hence the oral permission granted in contrary to rule 3-A.

10. Furthermore, on orders passed under rule 3-A, a Civil Revision Petition would lie to this Court, which will have to scrutinise the Order, to find out as to what were the reasons which prevailed for granting permission. If oral permission is granted, the reasons which prevailed upon the trial court would be unknown, and in turn parties would suffer. When the rule itself imposes a duty to record reasons, no other method is permissible. Hence, accepting the statement made by the Court that it had granted oral permission, which method is improper, the order of the Court below is set aside, and it is directed to dispose of the application afresh. Hence this petition is allowed. No costs.

R.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and G.Maheswaran, JJ.*

*W.A.Nos.161 and 175 of 1984.

6th February, 1985.

The Tamil Nadu Co-operative Milk Producers Federation Limited, Madhavaram, Madras, represented by its Managing Director *Appellant**

v.

The Tamil Nadu Dairy Development Corporation Employees Union represented by its General Secretary, Madras-51 and another *Respondents.*

and

The State of Tamil Nadu, represented by the Commissioner and Secretary to Government Labour and Employment Department, Madras-600 009 *Appellant**

v.

The Tamil Nadu Dairy Development Corporation Employees Union represented by its General Secretary, Madras-20 and another *Respondents.*

Industrial Disputes Act (14 of 1947), sections 10, 12(5), 22 - Representations by workmen to refer a dispute for adjudication by a tribunal - Government declining to refer on the basis of expediency alone - Held that Government cannot refuse to direct a reference merely on the ground of expediency without considering other relevant material.

Having regard to the objects sought to be achieved by section 10 of the Industrial Disputes Act, even though expediency is a relevant consideration to be taken into account by the government while considering the question of reference under the provisions of the Act, a reference cannot be refused merely on the ground that it is not expedient. The affectation of the rights and interests of a vast

number of workman is also a relevant consideration to be taken into account along with a consideration of the question of expediency Government is not prevented from considering the merits of the dispute raised by the workmen. It is no doubt true that section 12(5) does not make it obligatory on the part of the Government to make any reference at all and it has got discretion to refer or not to refer the dispute. Even that discretion is qualified by the requirement that the Government should be satisfied that there is a case for reference to a board or a tribunal and when the Government decides to make a reference, it is required by section 12(5) to make a record of the reasons and communicate them to parties concerned.

[Para.5]

Before declining to make a reference the Government should have considered in the instant case (1) whether the illegal strike alone formed the basis of non-employment and, (2) whether the non-employment was justified by the facts of the case. *[Para.7]*

Cases referred to:-

Bombay Union of Journalists v. State of Bombay, (1964)6 S.C.R.22: A.I.R.1964 S.C.1617; *Gujarat Steel Tubes Limited v. G.S.T.Mazdoor Sabha*, (1980)1 L.L.J. 137: (1980) Lab.I.C.1004: (1980)2 S.C.C.593: (1980)2 S.C.R.146: A.I.R.1980 S.C.1896; *R.Thakar Prasad v. Phoenix Mills*, (1976)1 Lab.L.J.93; *M/s.Hochtxef Common v. State of Orissa*, (1975)2 S.C.C.649: (1975) Lab.I.C.1608: (1975)2 Lab.L.J.418: A.I.R.1975 S.C.2226; *Industries, Labour and Corporation Department v. The Workmen of the South India Saiva Siddhantha Works Publicity Society, Tirunelveli Limited, Madras*, (1965) 1 M.L.J.517= (1964)1 Lab.L.J.228: I.L.R. (1964)1 Mad.850= A.I.R.1964 Mad.468; *Ramachandra Aboji v. State of Bombay*, A.I.R.1952 Bom.293; *Degaram Tuloute v. State of Bihar*, A.I.R.1950 Pat.387; *Workmen of Firestone Tyre and Rubber Company v. Management*, (1973)3 S.C.R. 587: (1973)1 S.C.C.813: (1973) Lab.I.C. 851: (1973)1 Lab.L.J.278: A.I.R.1973 S.C.1227.

Appeals under clause 15 of the Letters Patent against the Order of Mr.Justice Venkataswami dated 19.12.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.4024 of 1983 presented under Article 226 of the Constitution of India to issue a writ of *Certiorarified* Mandamus calling for the records relating to the order of the first respondent in G.O.Ms. No.371, Labour and Employment Department, dated 14.9.1983, quash the same, and direct the 1st respondent to refer the dispute relating to the non-employment of the members of the petitioners Union for adjudication under the Industrial Disputes Act.

The Judgment of the Court was delivered by

Ramanujam, J.:- These two writ appeals are directed against the Judgment of Venkataswami, J. in W.P.No.4024 of 1983. The first writ appeal has been filed by the Tamil Nadu Co-operative Milk Producers Federation Limited (hereinafter referred to as the Federation) and the second writ appeal has been filed by the State of Tamil Nadu. The circumstances under which the said writ petition came to be filed by the Tamil Nadu Dairy Development Corporation Employees Union (hereinafter referred to as the Union) may briefly be stated. The Dairy Development Department of the State of Tamil Nadu established two dairies one at Madhavaram and the other at Ayanavaram. Later a Corporation known as the Tamil Nadu Dairy Development Corporation was formed and the two dairies were transferred to the said Corporation. The Corporation also established and ran a third dairy at Ambattur. On 1.2.1981 the Tamil Nadu Co-operative Milk Producers Federation was formed. The Union issued a notice of token strike in support of various demands and in fact observed a token strike on 19.11.1980. According to the Tamil Nadu Dairy Development Corporation Employees Union the said strike was legal and justified, and after the token strike on 19.11.1980, the members of the Union reported for duty on the next day but they were refused employment by the Federation. Thereafter, in view of the said attitude of the Federation, the Union

was compelled to launch an agitation demanding that its members be taken back to work. The agitation was continued and lasted for several months. In spite of several meetings with the Minister in charge of the Dairy Development and assurance held out at such meetings, nothing took place and therefore the agitation continued. After waiting for more than a year the Union served a notice upon the Federation on 10.1.1982 intimating that the workers were always ready and willing to resume duty and it was only the Federation which had refused to employ them. After the said notice, the members of the Union presented themselves physically for duty on 15.2.1982. But the Federation did not permit entry. Thereafter, on 16.2.1982 individual letters were sent by each of the members of the Union putting the blame on the Federation for refusing employment. In reply to the said individual letters, the Federation served an order to each of the members of the Union stating that the members of the Union were absent from duty on 19.11.1980 and they did not report for duty thereafter and that in view of their long absence from duty the Federation had come to the conclusion that the members of the Union had abandoned their employment with effect from 19.11.1980 and therefore they ceased to be in the service of the Federation. The said communication also called upon the members of the Union to settle their accounts. This dispute between the Union and the Federation relating to the non-employment of the members of the Union by the Federation was the subject matter of conciliation proceedings and the Special Deputy Commissioner of Labour after consideration of the rival contentions put forward by the parties during the conciliation by his report dated 16.11.1982 gave a report of failure of conciliation to the Government. The Union made representations to the Government to refer the dispute for adjudication by a competent tribunal as it involved the livelihood of a large number of workmen numbering 901. However, the Government passed G.O.Ms.No.371 Labour and Employment dated 14.2.1983 declining to refer the said dispute for adjudication and the reasons set-out in the Government Order of declining a reference are four-fold. They are (i) The strike from 19.11.1980 was in direct contravention of section 22(a) of the Industrial Disputes Act in that no notice to the employer as required thereunder was given and this has rendered the strike illegal; (ii) the Federation is running a public utility service; (iii) having resorted to an illegal strike and continuing the same, the workers had caused hardship to the society at large in the supply of milk and milk products and (iv) in such an essential service, the workmen ought not to have gone on strike without exhausting the legal remedies and without complying with the statutory requirement.

2. Aggrieved by the said order of the Government refusing to refer the dispute, the Union filed W.P.No.4024 of 1983. In the said writ petition the Union complained that the Government had not applied its mind to the nature of the dispute, that the reasons given by the Government for declining the reference have no relevance whatsoever to the dispute raised, that the reference of a dispute regarding non-employment of workmen may be declined only if *prima facie* the government comes to the conclusion that the non-employment was fair and proper and that non-employment was effected after a properly conducted enquiry or under the Standing Orders or under any other provisions of law. It is also the case of the Union that the order of the Government declining reference is vitiated by malice in law as well as malice on facts in that the Federation acted on the dictates of the State Government and in particular the Minister in charge and as such the Government has not approached the matter in a fair and honest manner but sought to protect the interests of the Federation overlooking the interests of the workmen concerned and that the reasons given in the impugned order also bristles with inaccuracies of fact in that, according to the workmen, the lightning strike was only for one day on 19.11.1980 and that it was quite legal and the same does not contravene section 22 (a) of the Industrial Disputes Act as has been assumed by the Government.

3. The said writ petition was opposed both by the State of Tamil Nadu and the

Federation who were respondents 1 and 2 therein. The first respondent filed a counter affidavit to the following effect:

> "The workmen in question, struck work from 19.11.1980 to 20.11.1980 in contravention of the provisions of sections 22 and 23 of the Act and that too, during the pendency of Conciliatory talks before the Deputy Commissioner of Labour II, Madras. Having resorted to an illegal strike in public utility services, the workmen continued the strike causing hardship to the community at large in the supply of milk and milk products. In short the workmen had abandoned their jobs/contracts. Therefore, the contention of the workmen that they were refused employment and were not allowed to join duty or resume work is totally unfounded."

In G.O.Ms.No.371 Labour and Employment dated 14.2.1982, the Government have declined to refer the dispute for adjudication for the reasons set out therein which are valid and would amply justify the decision of the government.

4. Venkataswami, J. after considering the rival contentions, held that the first respondent, Government of Tamil Nadu, has mis-directed itself in point of law in wholly omitting to take into account a relevant consideration and therefore the impugned order is liable to be set aside. The relevant consideration which, according to the learned Judge had not been taken into account by the Government while considering the question of reference is as regards the validity of the non-employment of the workmen. According to the learned Judge the Government has not considered as to whether the non-employment of the workmen is justified and valid and only if the government comes to the conclusion that the non-employment of workmen on the facts and circumstances is justified, it can refuse to make a reference and as such, the non-consideration of the question of the validity of non-employment of the workmen will vitiate the order refusing a reference. In that view the learned Judge issued a *mandamus* directing the government to consider the matter afresh in the light of the principles laid down in the various decisions referred to in his order. It is against the said order of the learned Judge directing the government, to reconsider the matter, the above two appeals have been filed one by the Federation and the other by the State.

5. According to the Government, it considered the question of expediency and declined to make a reference on the ground that it is not expedient and the order passed by the Government can be justified on the ground of expediency and the learned Judge is in error in holding that there has been a mis-direction on the part of the government on a point of law in not considering the question of the validity or justification for non-employment of the workmen which is a relevant consideration. Therefore, the question is whether the impugned order of the Government declining to make a reference could be justified on the basis of expediency alone without the government going into the question at least *prima facie* as to whether the non-employment was valid and proper. It cannot be disputed that in this case the Government has not gone into the merits of the dispute but only proceeded on the basis of expediency while rejecting the reference. Thus the two main questions that arise in these appeals are (i) whether the impugned order could be justified on the ground of expediency alone or whether the government is bound to consider at least *prima facie* the merits of the dispute sought to be referred to and (ii) whether the impugned order is vitiated for non-consideration of the relevant material. The learned Advocate General appearing for the State Government who is the appellant in W.A.No.175 of 1984 submitted that the Government has got the power to reject the reference merely on the ground of expediency without going into the merits of the dispute especially when the service in question is an essential service. In support of the said stand, he refers to the decision of the Supreme Court in *Bombay Union of Journalists v. State of Bombay*, (1964)6 S.C.R.22= A.I.R.1964 S.C. 1617. In that case the Supreme Court has observed that if the claim made by the workmen is patently frivolous or is clearly belated, the appropriate government

may refuse to make a reference and likewise if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse the appropriate government may take that into account in deciding whether a reference should be made or not. According to the learned Advocate General even if a case is made out for a reference on the merits, still the Government can refuse to make a reference on the ground of expediency. We are not, however, in a position to agree with the said contention that the Government can reject a reference only on the basis of the expediency without considering other relevant materials. Take a case where the Government considers *prima facie* case is made out on the merits. In such a case the government cannot refuse to direct a reference merely on the ground of expediency. Even in such a case where the rejection of reference could be resorted to on the basis of in-expediency, the interests of the workers will stand sacrificed on the altar of expediency. Having regard to the objects sought to be achieved by section 10 of the Industrial Disputes Act, we have to hold that even though expediency is a relevant consideration to be taken into account by the government while considering the question of reference under the provisions of the Act, a reference cannot be refused merely on the ground that it is not expedient. The affectation of the rights and interests of a vast number of workman is also a relevant consideration to be taken into account along with the consideration of the question of expediency. It is, well established by a series of the decisions of the Supreme Court that the Government is not prevented from considering the merits of the dispute raised by the workmen *prima facie*. It is no doubt true that section 12(5) does not make it obligatory on the part of the government to make any reference at all and it has got discretion to refer or not to refer the dispute. Even that discretion is qualified by the requirement that the Government should be satisfied that there is a case for reference to a board or a tribunal and where the government decides to make a reference it is required by section 12(5) to make a record of the reasons and communicate them to parties concerned. In this case it is common ground that the dairies in question had been notified as a public utility service. Therefore, section 22(4) of the act has to be complied with before the workers proceed on a strike. A strike held in violation of section 22 is illegal. In this case, one of the reasons given by the government for refusing to make a reference is that the strike resorted to by the workmen is in violation of section 22. However, the dispute sought to be referred is not as to whether the strike is legal or illegal but as to whether the non-employment of the workmen after the strike is justified or not. Even assuming that the strike is in contravention of section 22(1) and as such illegal, that alone cannot be taken to be the basis for the non-employment. As already stated in this case after the workmen resorted to the strike which is said to be illegal, notice of termination has been issued to individual workmen stating that as they have abandoned their work their services will stand terminated. The dispute is whether such termination of employment is justified or not. It has been pointed out by the Supreme Court in *Gujarat Steel Tubes Limited v. G.S.T. Mazdoor Sabha*, (1980)1 L.L.J.137= (1980) Lab.I.C.1004= (1980)2 S.C.C.593= (1980)2 S.C.R.146= A.I.R.1980 S.C.1896 as follows:

> "The cardinal distinction in our punitive jurisprudence between a commission of enquiry and a court of adjudication between the cumulative causes of a calamity and the specific guilt of a particular person, is that speaking generally, we have rejected, as a nation, the theory of community guilt and collective punishment and instead that no man shall be punished except for his own guilt. Its reflection in the disciplinary jurisdiction is that no worker shall be dismissed save on proof on his individual delinquancy. Blanket attainder of bulk of citizens on any vicarious theory for the gross sins of some only, is easy to apply but obnoxious in principle."

Therefore, even if the strike is illegal, there should have been enquiry on the question as to what extent the individual worker is responsible and whether his service could be terminated for that reason.

As pointed out in the same case, not reporting for duty does not lead to an irrebuttable presumption of active participation in the strike and more is needed to bring home the *mens rea* and that burden is on the management. Therefore, whether the strike is illegal is not an issue at this stage when the workmen seek a reference on the question whether their non-employment is justified. The question which arises here is as to whether in the light of the finding rendered by the Government, all the workers should face non-employment or whether individual cases with special reference to their active participation in the strike should be considered. As already stated, all the workmen have been served with individual notices stating that they have abandoned their employment. When the workmen dispute the case of abandonment put forward by the management, that question has to be considered. The question as to whether the non-employment of the workmen was justified on the basis of the alleged abandonment of work has not been considered by the Government. In the case referred to above, the Supreme Court had to consider a somewhat similar situation where on the plea that there has been an illegal strike, there has been non-employment of all the workmen. That was challenged. The Court stressed the need for individual charge sheet being delivered to individual workman so that the degree of misconduct of each workman and the quantum of punishment of each may be separately considered and that though all the workmen may be equally guilty of participation in the illegal strike, all the workmen may not be liable for the same kind of punishment as the punishment has to depend on the extent of participation or involvement of the concerned workmen. Again as pointed out by the Supreme Court in the said case, there may be actual participation and passive participation on the part of the workmen. It may be that those workmen who have actually participated in the illegal strike may deserve a more serious punishment. The person who are guilty of passive participation, that is, at the risk of facing the militant workmen who are actually participating in the illegal strike stopped away from work cannot be punished to the same extent as in the case of active participants or the militant workmen. On the basis that the strike resorted to by the workmen is illegal, it may be that the management could take disciplinary action against the workmen under the Standing Orders and dismiss then but that was not what was done in this case. In this case, the non-employment has been resorted to on the basis that the workmen abandoned their employment. Whether the Standing Orders applicable to the workmen provide for the non-employment on the ground of abandonment of work is a matter to be considered while determining the question whether the non-employment is justified. Even if the Standing Orders provide for abandonment of employment and that is taken as the basis for disciplinary action, the workmen have to be asked for an explanation and formalities will have to be gone into before terminating the services of the workmen. This is clear from the decision of the Bombay High Court in *Thakar Prasad v. Phoenix Mills*, (1976)1 Lab.L.J.93. In *M/s. Hochtxef Common v. State of Orissa*, (1975)2 Lab.L.J.418: (1975)2 S.C.C.649= (1975) Lab.I.C. 1608= A.I.R.1975 S.C.2226. Alagiriswami, J. speaking for the Bench deduced the following principles from the earlier decisions of the Supreme Court.

"The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the Executive acts lawfully. It is no answer to the exercise of that power to say that the Executive acted *bona fide* or that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reason. If they give reasons and they are not good reasons, the court can direct them to reconsider the matter in the light of relevant matters, though the propriety, adequacy or satisfactory character of these reasons may not be open to judicial scrutiny. Even if the Executive considers it is

expedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts."

As pointed out by the Supreme Court in *Bombay Union of Journalists v. State of Bombay*, (1964)1 Lab.L.J.351=(1964)6 S.C.R. 22= A.I.R.1964 S.C.1617, this Court cannot sit in appeal over the orders of the Government refusing to make a reference and is not entitled to consider the propriety or the satisfactory character of the reasons given by the government. But, if the reasons given show that the appropriate government had not taken into account a relevant consideration or has taken into account an irrelevant consideration, then the Court may consider the case on a writ of *mandamus*.

6. The learned Advocate General and Mr.N.G.R.Prasad appearing for the appellants referred to the decisions in *Industries, Labour and Corporation Department, Madras v. The Workmen of the South India Saiva Siddhanta Works Publishing Society, Tirunelveli Limited, Madras*, (1965)1 M.L.J.517= (1964)1 Lab.L.J.228= I.L.R. (1964)1 Mad.850= A.I.R.1964 Madras 468, *Ramachandra Aboji v. State of Bombay*, A.I.R.1952 Bombay 293 and *Degaram Tiloute v. State of Bihar*, A.I.R.1950 Patna 387 in support of their submissions that it is not obligatory on the part of the government to refer the dispute, that the Government is justified in refusing to refer the dispute when it finds that it is not expedient to make the reference and that therefore this court cannot interfere with the order of the Government. But it is significant to note that all the above decisions were rendered before the introduction of section 11-A of the Industrial Disputes Act. The Introduction of the said section has brought in a vital change and the jurisdiction of the Labour Court or the Industrial Tribunal has considerably been widened. Under that section, the Labour Court or the Tribunal can go into the question of the punishment even if the management justified the imposition of punishment. The impact of section 11-A of the Act has been examined by the Supreme Court in *Workmen of Firestone Tyre and Rubber Company v. Management*, (1973)1 L.L.J.278= (1973)3 S.C.R. 587= (1973)1 S.C.C.813= (1973) Lab.I.C.851= A.I.R.1973 S.C.1227 and the Supreme Court has pointed out that section 11-A now gives full power to the Tribunal or the Labour Court to go into the evidence and satisfy itself on both the points as to whether misconduct is proved or not and if proved whether it would warrant the punishment of dismissal or discharge. In that case the Supreme Court has observed as follows:

"What lies in the ambit of the government's jurisdiction for not making a reference is to consider whether a *prima facie* case for reference existed or not and whether on certain grounds as pointed out by their Lordships, it was not expedient to make a reference as for example, when the claim was patently frivolous, clearly belated or due to its adverse impact on the industrial relations in the State. Therefore, it is on these mandatory guidelines that this statutory discretion has to be exercised by taking into consideration only those relevant guidelines."

7. Thus, on a due consideration of the matter, we are of the view that the government has not taken into account the following relevant considerations while rejecting the reference. They are (i) whether the illegal strike can alone form the basis of non-employment and (ii) whether the abandonment of the employment pleaded by the Federation has *prima facie* been established and in any event whether the non-employment was justified on the facts of this case. As we have already stated, while considering the question of reference the Government's failure to take into consideration the relevant circumstances will vitiate the decision of the government. In this view of the matter, we are inclined to agree with the view taken by the learned single Judge. The writ appeals are therefore dismissed. There will, however, be no order as to costs.

Since the time granted by Venkataswami, J. for reconsideration had already expired, the time for consideration is extended by two months from the date of receipt of this order.

---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswami and T.Sathiadev, JJ.*

*Writ Appeal No.114 of 1985 and W.P.Nos. 65, 510 and 511 of 1985.

7th March, 1985.

Anil G.Merchant *Appellant**

v.

The Director of Revenue, Intelligence, Madras-17 and others *Respondents.*

(A) Constitution of India (1950), Article 22(1) - Fundamental right of a person to conduct and to be defended by a legal practitioner - Applicability to person being interrogated under section 108 of the Customs Act - Person summoned by a customs officer under sections 107 and 108 of the Customs Act not a person taken into custody - Held that such a person has no fundamental right to have the presence of a lawyer of his choice during examination on interrogation.

(B) Customs Act (52 of 1962), sections 107 and 108 - Person examined or interrogated, not a person in custody.

Section 107 of the Customs Act enables an officer of Customs empowered in this behalf during the course of an enquiry in connection with the smuggling of any goods to require any person to produce or deliver any document or thing relevant to the enquiry and to examine any person acquainted with the facts and circumstances of the case. Section 108 gives power to any gazetted officer of customs to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of any goods. These provisions, enable a customs officer to summon any person to give evidence or for the purpose of interrogation in connection with any enquiry which such officer is making in connection with the smuggling of any goods. The ection does not enable the customs officers to take any person to custody. When a person is obliged to attend in pursuance of the summons issued under section 108 and state the truth he could not be considered while he was examined or interrogated as in the custody of the customs officials. In such a situation as he is expected to appear before the officers in obedience to the summons and in compliance with law, he cannot be considered to be a person taken into custody. *[Para.3]*

The right to consult a legal adviser is different from requiring a lawyer or an advocate to be present while examining or interrogating a person during an investigation. At that stage necessarily the investigation has to be secret and in fact, even the identity of the person interrogated or examined may have to be kept secret until a late stage in the investigation itself. A person interrogated under section 108 may be a person involved in the commission of any offence or may be a person who only knows some facts or about somebody-else committing it, who is in the nature of a witness unconnected with the offence. *[Para.4]*

There is no fundamental right to a person who is summoned under section 108 to give evidence or to answer questions or to have the presence of a lawyer of his choice during examination or interrogation. *[Para.4]*

Cases referred to:-

Roshan Beevi v. Joint Secy. to the Govt. of Tamil Nadu, (1984) Crl.L.J.134: (1983) L.W. (Crl) 289; *Nathu v. State of U.P.,* A.I.R.1956 S.C.56; *M.H.Hoskot v. State of Maharashtra,* (1978) Crl.L.J.1678: (1978)3 S.C.C.544: (1978) S.C.C. (Crl.) 468: A.I.R.1978 S.C.1548; *Francis Coralie v. Union of Territory of Delhi,* (1981)2 S.C.J.18: (1981) M.L.J. (Crl.) 331: (1981) Crl.L.J.306: (1981)1 S.C.C. 608: (1981) S.C.C. (Crl.) 212: (1981)2 S.C.R.516= A.I.R.1981 S.C.746; *A.K.Roy v. Union of India,* (1982)2 S.C.J.68: (1982) M.L.J. (Crl.) 524: (1982) Crl.L.J.340: (1982)1 S.C.C.271: (1982) S.C.C. (Crl.) 152= A.I.R.1982 S.C.710; *Nandini Satpathy v. P.L.Dani,* (1978)

Crl.L.J.968: (1978)2 S.C.J.424: (1978) S.C.C. (Crl.)236: A.I.R.1978 S.C.1025; *Miranda v. Arizona*, (1966) 384 U.S.436; *R.C.Mehta v. West Bengal*, (1969)2 S.C. R.461: (1970) Crl.L.J.863: A.I.R.1970 S.C.940; *Veera Ibrahim v. State of Maharashtra*, (1976)3 S.C.R.672: (1976)2 S.C.C.302: (1976) S.C.C. (Crl.) 278: (1976) Crl.L.J.860: A.I.R.1976 S.C.1167; *Ashadevi v. K.Shivraj*, (1979)1 S.C.J. 538: (1979) M.L.J. (Crl.) 441: A.I.R. 1979 S.C.447; *Sevantila v. State of Maharashtra*, (1979)2 S.C.C.58= A.I.R. 1979 S.C.705.

Appeal under clause 15 of the Letters Patent against the order of Mr.Justice Natarajan, dated 22.1.1985 and made in W.P.No.163 of 1985 presented under Article 226 of the Constitution of India to issue a Writ of *Mandamus* directing the respondents to forbear from using petitioner's statements obtained by the respondents' officials in S.I.B.No.1/85 on the file of the second respondent in any proceedings against the petitioner therein etc.,

The Court made the following

ORDER:- The writ appeal has been filed against an order of a single Judge dismissing W.P.No.163 of 1985 *in limine* at the admission stage itself. It appears that on an examination of a consignment of 7 drums of goods declared as Alkylarylsulphonate S.N.(TAMOL) imported by one Messrs. Sudharsan Chemicals, Station Road Ramnagar Bangalore, under the cover of A.W.B.No.08576881836 which was passed out of customs charge on payment of duty on 3.1.1985 it was found that the drums contained goods other than the goods declared in the bill of Entry. The goods were detained under section 110 of the Customs Act. On 4.1.1985 another consignment of 5 drums of the same chemical imported by one Messrs. Lakshmi Chemicals, Karnataka, under cover of Bill of Entry dated 26.12.1984 was also found to contain goods other than the one declared in the Bill of Entry. On the ground that the Customs Authorities had reason to believe that the appellant is guilty of an offence under section 135 of the Customs Act arrested him at 10 a.m. on 5.1.1985 under section 104 (1) of the Customs Act and produced him before the Magistrate the same evening at 3.30 P.M. The appellant thereafter was released on bail on the same day. In the affidavit he had stated that when he was in the Air Port at Madras on the 3rd of January, 1985, with a clearing agent, he was called by the Director of Revenue Intelligence Officials and taken to Aircargo Complex, and from there he was taken to their office in T.Nagar, Madras-17. He was taken inside a room and surrounded by two officers and other employees of the Department and was interrogated by them throughout the night. They did not allow him to sleep nor even to sit. He was severely beaten and ill-treated and kept in unlawful detention till 5.1.1985 and forced to subscribe to a statement made against his will. During the above period, he was not allowed to contact anybody including his advocate in spite of specific request. In fact, it was his case that his advocate was searching for him from 3rd January, 1985 onwards, went to the office of the Director of Revenue Intelligence on the 4th and on the 5th but he was not given any information about his presence there or about the interrogation. The advocate wrote a letter on 5.1.1985 to the Assistant Collector of Customs stating that he understood that the appellant was in his custody since 3.1.1985, that he files his memo of appearance for him and that he may be permitted to be present at the time of interrogation if the appellant is there and is being interrogated. No reply was given to him. As already stated on 5.1.1985 at 10 A.M. the appellant was arrested and produced before the Magistrate on the same day. After he was released on bail, the Department had issued notices under section 108 of the Customs Act requiring him to be present for enquiry or interrogation on the subsequent dates at the stated hours. He did appear for enquiry on 8.1.1985 and gave a statement. In the meantime, on 21.1.1985 the learned counsel for the appellant wrote a letter to the Department stating that Article 22(1) of the Constitution gives a fundamental right to the appellant to consult and to be defended by a legal practitioner and requested the respondents to inform him immediately whether he will be permitted

to exercise the above right during interrogation. This request of the counsel for the appellant was rejected on 30.1.1985. In the other three cases on the ground that the writ petitioners are involved in illicit export of snake skins, notices were issued to them under section 108 of the Customs Act directing them to appear before the officers in connection with the investigation and or interrogation. In those cases also the petitioners pleaded that their counsel shall be permitted to be present while they are interrogated by the customs officials.

2. In all these cases the arguments of the learned Counsel for the appellant and the petitioners is that they have a fundamental right to have legal assistance which would include a right to a Counsel to accompany them and be present during interrogation. The right is guaranteed under Articles 21, 22(1) and 39-A of the constitution and any statements obtained in infringement of the constitutional guarantee could not be used in any proceeding against the petitioner.

3. Section 107 of the Customs Act enables an officer of Customs empowered in this behalf during the course of an enquiry in connection with the smuggling of any goods to require any person to produce or deliver any document or thing relevant to the enquiry and to examine any person acquainted with the facts and circumstances of the case. Section 108 gives power to any gazetted officer of customs to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods. Clause (3) of section 108 further provides that all persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct and that all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required. These provisions, therefore, enable a customs officer to summon any person to give evidence or for the purpose of interrogation in connection with any enquiry which such officers is making in connection with the smuggling of any goods. Neither these provisions in section 107 nor section 108 nor any other provision in the Act or the rules framed thereunder restrict the right of the customs officer to require the person to appear only at stated hours. In the nature of things, therefore, it will have to depend on the facts and circumstances of the case and therefore the only thing which we can expect is that the time and place shall be reasonable and fair having regard to the facts in that particular case. Normally it is expected that such interrogation or examination will be done during the normal office hours or during day time. However we could not say that in every case it could be done only during day time or during office hours. If the circumstances demand an examination or interrogation immediately or during the nights subject to all other reasonable facilities provided to the person interrogated or examined it could be done at any time. The other thing which is expected is that the examination should be conducted in such a way consistent with human dignity and comfort and not inhuman, unreasonable or unfair. The provisions in the Customs Act do not also enable the customs officers to extract, coerce or use any third degree methods as mentioned by the counsel for the petitioners in the matter of examination or interrogation in exercise of powers under section 107 or section 108. The section does not enable the customs officers to take any person to custody. When a person is obliged to attend in pursuance of the summons issued under section 108 and state the truth he could not be considered while he was examined or interrogated as in the custody of the customs officials. In such a situation as he is expected to appear before the officers in obedience to the summons and in compliance with law, he cannot be considered to be a person taken into custody. Taking them as captive prisoners, coercing them to give false statements or depriving them of elementary facilities are not authorised by the Act. It is needless to expressly prohibit such actions. If and when the officers violate any of these principles or coerce them to give

false confessions; it would always be open to the person concerned to complain of the same wherever those statements are sought to be used and if the allegations are established, certainly nobody could reply or take note of those statements. In this connection we may note that a Full Bench of this Court in the decision reported in *Roshan Beevi v. Joint Secretary to the Government of Tamil Nadu, Public Works Department, etc.* (1983) L.W. (Crl.) 289= (1984) Crl.L.J.134 in paragraph 48 observed:

> "If, in a given case, the Customs Official detains any person required or summoned under the provisions of the Customs Act for a prolonged period, even exceeding twenty-four hours, it keepts him in closed doors as a captive prisoner surrounded by officials or locks him in a room or confines him to an office premises, he does so at his peril, because sections 107 and 108 of the Customs Act do not authorise the officer belonging to the Customs Department to detain a person for a prolonged custody and deprive him of the elementary facilities and privileges to which he is entitled. In such a situation, the officer must be held to have over-stepped his limits, and any confessional statement obtained from such a person by keeping him in a prolonged custody has to be regarded with grave suspicion, because there is always room for criticism that such a confession might have been obtained from extorted mal-treatment or induced by improper means. As pointed out by the Supreme Court in *Nathu v. State of Uttar Pradesh*, A.I.R.1956 S.C.56, the prolonged custody may stamp the confessional statement so obtained as involuntary one, and the intrinsic value of such a statement may be vitiated. The question whether a person has been kept in prolonged custody is a question of fact, which has to be carefully considered against the background of the circumstances disclosed in each case. So, it is neither advisable nor possible to lay down any inflexible standards for the guidance of Courts, though in the ultimate analysis, it is the Court which is called upon to decide the circumstances of a particular case."

4. The contention of the learned counsel for the petitioners is that Article 21 of the Constitution protects the personal liberty of the individual, that the right to personal liberty includes a right to consult and be defended by a legal practitioner of his choice and this right to legal assistance shall be made available in all stages of interrogation or examination whether before arrest or after arrest and that this right could be taken away only in those cases where clause (3) of Article 22 is applicable. He also contended that this right to have the advocate of his choice to be present during interrogation or examination by the customs officials does not depend or based on the possible infringement of the personal liberty or possible violation of any provision of law or the possibility of the customs officials torturing, coercing or using any third degree methods to extract any wrong confession, but it is his fundamental right under Article 21 read in the light of Article 39-A of the Constitution and that therefore section 108 of the Customs Act not authorising a customs officer to take a person into custody or using unlawful means for extracting statements or coercing to give statements is not an answer to deprive him of his fundamental right. In this connection he referred to certain Supreme Court decisions which may be noticed at this stage. In *H.M.Hoskot v. State of Maharashtra*, (1978) Crl.L.J.1678: (1978)3 S.C.C.544: (1978) S.C.C. (Crl.) 468= A.I.R.1978 S.C.1548 the Supreme Court held that the ingredient of fair procedure to a prisoner is lawyer's services and that

> "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise, and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side."

Legal aid was considered as an inalienable element of fair procedure and Article 30-A requiring every State to secure equal justice and free legal aid is interpretative tool for Article 21. They further held that personal liberty cannot be cut out or cut down without fair legal procedure. All these forcible observations of the

Supreme Court were made with reference to the right of appeal to a convicted prisoner and his right to be provided with every facility for exercise of his right of appeal or revision and not in regard to any interrogation or examination of a person in pursuance of the summons under section 108 who at that time cannot even be considered to be a person in custody much less a person accused of any offence. In *Francis Coralie v. Union Territory of Delhi*, (1981)2 S.C.J.18= (1981) M.L.J. (Crl.) 331= (1981) Crl.L.J.306= (1981)1 S.C.C.608: (1981) S.C.C. (Crl.) 212= (1981)2 S.C.R.516= A.I.R.1981 S.C.746 the Supreme Court considered the validity of the conditions of a detention order dated 23.8.1975 issued by the Delhi Administration with reference to a person who was detained under the preventive detention provision in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. After pointing out that the right to life enshrined in Article 21 is not limited to protection of limb or faculty but includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about mixing and mingling with the fellow human beings and that any form of torture or cruelty, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into the right to live and therefore prohibited by Article 21 unless it is in accordance with procedure prescribed by law and which procedure also should stand the test of reasonableness and non-arbitrariness, invalidated clause 3 of the conditions of the detention order which was questioned there. That condition which was invalidated prescribed that a detenu can have interview with a legal adviser only after obtaining prior permission of the District Magistrate, Delhi, and the interview has to take place in the presence of an officer of the department. With reference to this provision the Supreme Court observed:

> "The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure establised by a valid law."

In our opinion, the right to consult a legal adviser is different from requiring a lawyer or an advocate to be present while examining or interrogating a person during an investigation. The right pleaded in this case by the learned counsel throughout was a right of the lawyers of the petitioners to be present when the petitioners were examined or interrogated in pursuance of a notice under section 108. At that stage necessarily the investigation has to be secret and in fact, even the identity of the person interrogated or examined may have to be kept secret until a late stage in the investigation itself. We have to also keep in mind that a person interrogated under section 108 may be a person involved in the commission of any offence or may be a person who only knows some facts or about somebody else committing it, who is in the nature of a witness unconnected with the offence. In the nature of things the investigation will have to be discreet and secret and therefore the only thing that is expected is the procedure adopted in the matter of examination or interrogation should be reasonable and not arbitrary and as held by the Supreme Court, no law which authorises and no procedure which leads to torture, cruel, inhuman and degrading treatment can ever stand the test of reasonableness and non-arbitrariness. As already stated, section 108 does not authorise any such troture or cruelty or inhuman treatment. The decision in *A.K.Roy v. Union of India*, (1982)2 S.C.J. 68= (1982) M.L.J. (Crl.)524= (1982) Crl.L.J. 340= (1982)1 S.C.C.271= (1982) S.C.C. (Crl.)152= A.I.R.1982 S.C.710 relied on by the learned counsel, in our opinion, also is if no assistance. That decision related to the right of a detenu who was

detained under the National Security Act to be represented by a lawyer before the Advisory Board constituted under that Act. Of course, the ratio of the judgment is to the effect that a right to legal assistance is also part of Articles 19,21 and 22(5). But as we have been referring to earlier, we are not concerned with a case of either a person accused or to be defended by a legal practitioner of his choice. In *Nandini Satpathy v. P.L.Dani*, (1978) Crl.L.J.968= (1978)2 S.C.C.424= (1978) S.C.C. (Crl.) 236= A.I.R.1978 S.C. 1025 with reference to the right of a person "accused of an offence" to have the presence of an advocate during interrogation, the Supreme Court observed in paragraph 59 as follows:

> "Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. *Miranda v. Arizona*, (1966) 384 U.S.436 has insisted that if an accused persons asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3), and Article 22(1) may, in a way, be telescoped by making it prudent for the Police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Over-reaching Article 20(3) and section 161(2) will be obviated by this requirement. We do not lay down that the Police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-incrimination secured in secrecy and by coercing the will, was the project."

We are of the view that these observations are made with reference to the right of the accused to silence and over-reaching of Article 20(3) and section 161(2) and could not be invoked in the case of an interrogation of a person in pursuance of a summons under section 108 of the Customs Act. In the same judgment, the Supreme Court observed:

> "The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest custody can be denied that right."

But this observation also has to be understood in the light of the continuing passage which reads as follows:

> "The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodical interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

Therefore, this right of a person to have his lawyer's presence duirng interrogation has to be tested only with reference to his right against self-incrimination. In one of the earliest cases in *R.C.Mehta v. West Bengal*, (1969)2 S.C.R.461= (1970) Crl.L.J.863= A.I.R.1970 S.C.940 with reference to a statement recorded by an officer of the Customs in an enquiry under section 171-A of the Sea Customs Act corresponding to section 108 of the Customs Act, 1962, the Supreme Court observed:

> "Under section 171-A of the Sea Customs Act, a customs officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression "any person" includes a person

who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a customs officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the customs officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the customs officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The customs officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs: When collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act he is not accusing the person of any offence punishable at a trial before a Magistrate".

The Supreme Court further observed in the same case as follows:

"Normally a person stands in the character of the accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a magistrate competent to try or send to another magistrate for trial of the offence. Where a customs officer arrests a person and informs that person of the grounds of his arrest (which he is bound to do under Article 22(1) of the Constitution) for the purpose of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the magistrate".

It may seen from these passenges that neither before he was arrested under section 104 nor after he was arrested under section 104 he can be considered to be a person accused of any offence. These observations were quoted with approval in a later decision in *Veera Ibrahim v. State of Maharashtra*, (1976)2 S.C.C.302: (1976)3 S.C.R.672= A.I.R.1976 S.C.1167= (1976) S.C.C. (Crl.) 278= (1976) Crl.L.J.860 which was a case under section 108 of the Customs Act, 1962. We may also notice in this connection the following two decisions reported in *Ashadevi v. K.Shivraj*, (1979)1 S.C.J.538= (1979) M.L.J. (Crl.) 441= A.I.R.1979 S.C.447 and *Sevantilal v. State of Maharashtra*, (1979)2 S.C.C. 58= A.I.R.1979 S.C.705. In *Ashadevi v. K.Shivraj*, (1979)1 S.C.J.538= (1979)M.L.J. (Crl.) 441= A.I.R.1979 S.C.447 a detention order under section 3(1) of Cofeposa 1974 was made against one Gopal Ghermal Mehta on the ground that it was necessary with a view to preventing him from engaging and transporting smuggled goods. The grounds of detention were served of the detenu. It was stated in the grounds that on receipt of certain information the officers of the customs kept a watch for a Fiat car and the said car with five occupants was intercepted near a railway crossing and the occupants which included the detenu and 4 others were taken to the Customs Divisional Officer for examination. The detenu and the other occupants denied that they were carrying any smuggled gold or prohibited articles; but, on a search, of one of the occupants, a large quantity of gold bars with foreign markings were recovered. Briefly stated, they confessed that they were carrying the gold belonging to a different person and that they were merely carriers who used to receive remuneration for such transport. The detenu also had stated that this has been going on for about 6 to 8 months and that he had made 5 to 6 trips in a month and on each trip he used to carry $2\frac{1}{2}$ to 3 kgs of gold. The order of detention was challenged on the ground that the procedural safeguards had not been followed vitiating the requisite satisfcation on the part of the detaining authority

under section 3(1). It appears that when the interrogation of the detenu was going on, an advocate of the detenu addressed a letter as also a telegram making grievance about the wrongful restraint and illegal custody of the detenu by the customs officers beyond 24 hours and expressing apprehension that the detenu had been so detained with a view to obtaining confessional statement against his will. Again the advocate went in person to the customs officer and had sought permission to remain present at the time of interrogation of the detenu but that request was not acceded to as the customs officers were of the view that there was no provision in law permitting an advocate to remain present at the time of interrogation. The detenu was arrested and remanded to judicial custody and while he was in judicial custody also, he was interrogated. During such interrogation he resiled from his earlier confessional statement and squarely repudiated the facts stated therein. Thereafter the Chief Secretary to the Government of Gujarat passed the impugned detention order. One of the contentions raised against the validity of the detention order was that the satisfaction of the detaining authority must be regarded as vitiated inasmuch as some vital facts which had a material bearing and would have influenced the mind of the detaining authority one way or the other were neither placed before not were considered by the detaining authority before passing the detention order. One of the vital facts which according to the learned counsel was not placed before the detaining authority was that during interrogation in spite of request, neither the presence of nor the consultation with an advocate was permitted. After noting that it is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order, the Supreme Court considered whether the non-communication to the detaining authority that during interrogation of the detenu inspite of request neither the presence of nor the consultation with an advocate was permitted would vitiate the order. Though the Supreme Court quoted the passage in *Nandini Satpathi's Case*, (1978)2 S.C.C.424= (1978) S.C.C. (Crl.) 236= A.I.R.1978 S.C.1025 which we have extracted above and said that owing to some misconception of the legal position the request for the presence/consultation of a lawyer was turned down, it did not hold that there was a constitutional guarantee even during interrogation under section 108 of the Customs Act to have the presence of a lawyer; but that the detention order is vitiated by the fact that this vital fact of refusal to permit the presence of a lawyer during interrogation should have been communicated to the detaining authority because that had a bearing on the question whether the statements could be treated as voluntary or given under duress on the acceptance or rejection of the statements or the answers given during interrogation. We are therefore of the view that there is no fundamental right to a person who is summoned under section 108 to give evidence or to answer queries to have the presence of a lawyer of his choice during examination or interrogation. However, it is advisable for the department to permit the presence of the lawyers during such examination or interrogation taking such precautionary measures as may be considered necessary to keep the confidential nature of the statement and the secrecy of the enquiry. They should keep in view that if the presence of a lawyer during examination or interrogation is refused, the ultimate statements recorded themselves will become questionable as not voluntary or were statements which were obtained under duress and thereby making them not reliable statements in any proceeding.

5. For the foregoing reasons, we are of the view that the appeal and the writ petitioners are liable to be dismissed and they are accordingly dismissed.

The Order of Court was pronounced by

Ramaswami, J.:- Learned Counsel for the

petitioners makes an oral request under Article 134-A of the Constitution of India for grant of leave to appeal to the Supreme Court. We are not satisfied that any substantial question of law as to the interpretation of the Constitution arises out of the order or that any substantial questions of law of general importance which need be dicided by the Supreme Court arise in this case. Accordingly, we reject the request for grant of leave.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, J.*

*C.R.P.Nos.4111 to 4113 of 1984.
11*th December*, 1984.

Madhavan *Petitioner**

v.

Muniammal and others *Respondents.*

Civil Procedure Code (104 of 1976), Order 41, rule 22(1) as amended by Act 104 of 1976 - Scope of amendment - Not to alter the impact and implication of the rule but to adopt a more convenient language to have the position clarified.

The amendment and the introduction of the Explanation by Act 104 of 1976 to Order 41, rule 22(1), C.P. Code has not altered the impact and implication of the rule, but only a more convenient language has been adopted to have the position clarified. The explanation has been added empowering the respondent to file cross objection in respect of a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour. Order 41, rule 22 of the Code gives two distinct rights to the respondent in an appeal. The first one is the right to support the decree of the first Court on any of the grounds decided against him by the first Court. The respondent can state that the ground ought to have been found in his favour by the first court and by this the respondent does not attack the decree, which ensued in his favour. He only supports the decree and wants to demonstrate that an adverse finding by the first court is not a correct one. By doing this he only supports the decree and does not attack it. The second right given to the respondent is to take cross objections to the decree as such passed by the first Court, which decree would have gone against him in part and/or would have ensured to him in other respects. That cross-objection is cross-objection in the real sense and it partakes the character of an appeal for all practical purposes including payment of court-fees. The real test is to find out as to whether the respondent attacks the decree or supports the decree or in other language takes exception to the decree or accepts the decree irrespective of the fact that the decree wholly or in part is in his favour. *[Para.3]*

N.Sivamani, for Petitioner.

The Court made the following

ORDER:- Considering the limited scope of the controversy involved, the revisions themselves are taken up for final disposal today.

2. The petitioner has preferred cross-objections in regular appeals before the lower appellate Court. The cross-objection relate to the adverse finding of the trial court with reference to the adverse finding of the trial court with reference to the will marked Ex.B-43. The lower appellate Court had directed payment of court-fees on the cross-objections. Hence these revisions.

3. It is well settled proposition that with reference to an adverse finding against him, the respondent in an appeal

by the opposite party, can take objections to such finding in order to support the decree. Such objections though they may take the formal character of cross-objections are not cross-objections to the decree as such. Order 41, rule 22(1), Civil Procedure Code hereinafter referred to as the Code, amply enables the respondent, though he may not have appealed from any part of the decree, to support the decree by stating that the finding against him in the court below in respect of any issue ought to have been in his favour. The relevant part of the rule prior to its amendment by Act 104 of 1976 read as follows:

> "Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal..."

After the amendment, if reads as follows:

> "Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal..."

The amendment has also introduced an Explanation, which reads as follows:

> "A respondent, aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule file cross-objections in respect of the decree so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding, which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent."

The amendment and the introduction of the Explanation has not altered the impact and implication of the rule, but only a more convenient language has been adopted to have the position clarified. The Explanation has been added empowering the respondent to file cross-objection in respect of a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour. Order 41, rule 2 of the Code gives two distinct rights to the respondent in an appeal. The first one is the right to support the decree of the first court on any of the grounds decided against him by the first court. The respondent can state that the ground ought to have been found in his favour by the first court and by this the respondent does not attack the decree, which has ensured in his favour. He only supports the decree and wants to demonstrate that an adverse finding by the first court is not a correct one. Still by doing this he only supports the decree and does not attack it. The second right given to the respondent is to take cross-objections to the decree as such passed by the first court, which decree would have gone against him in part and/or would have ensured to him in other respects. That cross-objection is a cross-objection in the real sense and it partakes the character of an appeal for all practical purposes including payment of court-fees. The real test is to find out as to whether the respondent attacks the decree or supports the decree or in other language takes exceptions to the decree or accepts the decree irrespective of the fact that the decree wholly or in part is in his favour. If he accepts the decree but only attacks the findings which have gone against him. The objections need not necessarily be in writing and could be a matter of arguments. Cross-objections in the real sense must be to the decree. If the objections are to the findings, the nomenclature adopted the cross-objections will not alter the real position. If the cross-objection is in respect of the decree in the sense it attacks the decree, it cannot escape being treated as an appeal as such and it would have all the incidents of an appeal annexed to it including payment of court-fees. If, on the other hand, the objections are only in respect of an adverse finding and the intention was only to support the decree, by having that finding also turned and rendered in his favour, the obejctions by the respon-

dent cannot be treated as cross-objections on par with an appeal entailing payment of Court-fees. When the decree is in his favour either in whole or in part, the respondent seeks to support such a decree by advancing a plea that even a point or points decided against him by the first court, ought to have been found in his favour. By this process he does not attack the decree and he only supports the decree. The decree of the first court could also have gone against the respondent and he would like to get rid of that portion of the decree, which has gone against him, and in that sense, the respondent has to prefer the cross-objection to the decree, paying the requisite court fee therefor. In the first case where the respondent wants to support the decree, though he does this *ad modum* cross-objections, they are not cross-objections to the decree, and the nomenclature of cross-objections is adopted only by way of abundant caution. Such cross-objection do not call for payment of Court fees.

4. Mr.N.Sivamani, learned counsel for the petitioner, brought to my notice the pronouncements in *Ram Prasad Kalwar v. Musamat Ajanasia*, 44 All.577= A.I.R. 1922 All.280 and *Siva Pershan Mona v. Swarajlakshmi*, (1959)2 An.W.R.452 has followed the observations of the Full Bench of the Court in *Gaddam Chinna Venkatarao v. K.Satyanarayanamurthi*, (1943)2 M.L.J. 3361= 943 Mad.698= 56 L.W.527 (F.B.), apart from the observations of the Division Bench of the High Court of Allahabad in *Ram Prasad Kalwar v. Musammat Ajanasia*, 44 All.577= A.I.R.1922 All.280. These pronouncements place the legal position on this question beyond any ambiguity. In view of the legal position, these revisions are allowed and I make no order to costs.

5. The office is directed to return the memorandum of cross-objections filed along with these civil revision petitions to the learned counsel for the petitioners so as to enable him to present the same before the court below and the court below will receive them without insisting upon payment of court-fee on the same.

Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Natarajan, J.*

*W.P.No.10995 of 1984.
12*th November*, 1984.

Perunchithiranar *Petitioner**

v.

State of Tamil Nadu represented by its Chief Secretary, Madras-9 and others *Respondents.*

(A) Constitution of India (1950), Preamble and Articles 15 and 51(A) - Secular State whether consistent with giving a reverential elevated status to the ashes of the late Prime Minister and spending the public revenue to take the ashes to different places in the country for dharsan by people etc.

(B) Words and Phrases - 'Secular' means 'non-religious' and nor 'irreligious'.

A writ petition was filed for the issue of a writ of *mandamus* forbearing the Government from keeping the Urn containing the ashes of the cremated body of Srimathi Indira Gandhi for public dharsan, from taking the same to various places in India and from spending public revenue and using Government machinery for the said purpose. It was contended that the State being secular in nature it was bound to adopt a neutral attitude towards all religions, and it has neither power nor authority to participate in religious functions or spend funds from the public exchequer for the performance or observance of religious functions.

Held:- In any democracy and more so in India, Government has to respond to the will and wishes of the people. Whenever there is a tragic demise of a beloved and respected national leader, there is spontaneous upsurge among the people to pay their homage and respect to the departed soul. While those residing in areas near the place of demise can trek or travel to the scene of cremation

and pay their homage to the mortal frame, others living far away cannot do so. Their feelings of disappointment, anguish and pain at not being able to witness the funeral have to the assuaged in some measure at least and it is only for that purpose, the ashes of the cremated body are taken round the country and placed at different centres. No government worth the name, much less a democratic Government can be unmindful of the implorations of the people to pay their grateful homage to the memory of their departed national leader and since the Government's money is people's money, it has not only a right but a duty to avail of public funds for defraying the expenses for taking the sacred ashes to various parts of the country for being viewed by the public.

[Para.9]

The word 'Secular' among other things means pertaining to the present world or to things not spiritual, civil and not ecclesiastical; lay; not concerned with religion, nor bound by monastic rules. A "secular State" means a non-religious and not irreligious State. What follows is that the Government should not be wedded or bound to any one religion, but should give equality of treatment to every religion practised in the country. Article 15 of the Constitution proscribes (sic) the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth on any one of them. The State is therefore bound to give protection and afford facility to various sections of people to practise and follow their religion customs. In the case of national leaders, when calamity or tragedy over-takes them, the State is obligated to arrange for their funeral and obsequies in a manner befitting their status and in accordance with the pursuits of the particular religion to which the departed personality belonged. The performance of such duty by the State can, by no stretch of imagination, be characterised as non-secular activity. *[Para.10]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Mandamus* forbearing the respondents from keeping the Urns containing the ashes of the cremated body of late Tmt. Indira Gandhi for public 'Dharsan' or from taking the same to various places in India and from spending public revenue and using the Government machinery.

Perunchithiranar, for Petitioner.

The Court made the following

ORDER:- While the nation is still mourning the death of the late Prime Minister Srimathi Indira Gandhi, while the citizens of the country are still paying reverential homage to the departed soul with tearful eyes and bleeding hearts, while the National Flag is still flown half-mast and while the country is observing State mourning, this writ petition has come to be filed under Article 226 of the Constitution praying for the issue of a writ of *Mandamus* or any other appropriate writ, order or direction to the State of Tamil Nadu, the Union of India and the Chief Minister of Tamil Nadu, to

> "forbear from keeping the Urns containing the ashes of the cremated body of late Srimathi Indira Gandhi for public Dharsan or from taking the same to various places in India and from spending public revenue and using Government machinery for the said purposes."

2. The petitioner, Thiru Perunchithiranar has described himself in his affidavit as a rationalist and socialist working for the development of Tamil society all over the world and to be a publisher of a Tamil magazine, a Tamil weekly and a children's monthly magazine. The petitioner has averred in his affidavit that scientifically, the ashes of cremated human bodies are of no significance or importance and, consequently, the ashes of the late lamented Prime Minister cannot stand on a better footing. It is only superstition and religious beliefs, particularly among Hindus, which tend to give importance to the ashes of cremated human bodies. Under the Constitution, the State is secular in nature and, hence, the Government is bound to adopt a neutral attitude towards all religions, it has neither power nor

authority to participate in religious functions or spend funds from the public exchequer for the performance or observance of religious functions. Contrary to this postition the Central and State Governments are engaged in taking the ashes of the late Prime Minister to different parts of India including Tamil Nadu and this would amount to the Government actively engaging itself in the propagation of Hindu religious beliefs among the public. The practice of placing urns containing ashes for public dharsan, not only amounts to indulgence in 'unscientific practices', but will also constitute an unwise precedent to be followed when leaders of other parties meet their end. It also paves the way for the public to neglect their duties and waste their precious hours. Governmental obligations should stand confined only with ensuring decent burial or cremation of dead bodies and as such, Government has no power or authority to spend public funds for the carrying of the ashes of any departed leader from place to place by means of aeroplanes, trains, etc., for dharsan by people. By reason of such practices, no benefit or advantage is conferred on the public; on the contrary, it would amount to political propaganda, and it is for the purpose of political gain the ruling party is indulging in this practice. As the act of the respondents is *ultra vires* the Constitution, this Court should make them forbear by means of a writ of *mandamus* from taking the urns to various places for public dharsan and from spending from the public revenue and using the government machinery.

3. When the petition came up for admission, the petitioner appeared in person and argued his case. Besides reiterating the averments contained in the affidavit, the petitioner stated that as a citizen of India, he has a fundamental duty under Article 51-A of the Constitution to abide by the Constitution and respect its ideals and institutions, and to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities.

4. Reduced to legalistic propositions for consideration, by the Court, the rationalist's contentions are as below.

"1. The ashes of cremated human bodies are alike and do not bear distinctive features and, as such, it is wrong to give a reverential or elevated status to the ashes of the late Prime Minister;

2. Government is under no duty or obligation to make arrangement for taking the ashes to various parts of the country and its obligation ends with ensuring decent burial or cremation of dead bodies of human beings.

3. Government is not entitled to utilise public revenue for taking the ashes of leaders to different places in the country.

4. Giving importance to ashes of cremated human bodies is a peculiar trait of the Hindu faith and as such, Government's participation in making arrangements for the public dharsan of the late Prime Minister's ashes will amount to government's propagation of the Hindu faith and customs."

5. Shocking and revulsive as the contentions of the petitioner are, as may presently be seen, the Court would be justified in rejecting the petition with no more words than the disyllabic word 'dismissed' or, in the alternative, to give a quietus to the petition as having become infructuous on the ground the impugned exercise of Government is by now over as the ashes have already been taken back for being scattered over the majestic Himalayas in fulfilment of the wishes of the departed soul. But, neither of the courses would provide an effective reply to the sacrilege committed on humanity by the petitioner filing this petition. I shall therefore proceed to evaluate the contentions of the petitioner on their merits and render judgment.

6. Every religion has its own way of returning the dead bodies of human beings to the natural elements. Cremation, embalment, burial, consignment to watery graves and offering to birds, are the known modes of returning the dead bodies to

the bowels of Mother Earth. But, whatever be the form of disposal of the lifeless bodies, every religion and every faith commends the dead bodies to be treated with reverence and dignity till the last vestiges of the bodies merge with the elements. It so happens that large sections of the Hindu faith resort to the ordained practice of cremating dead bodies. After the body is consigned to the flames what are left over are the remnants of the bones and the ashes. Do these remnants have significance or value, is the poser for consideration?

7. Thinker, as the petitioner claims to be, he fails to see that there are different levels of thoughts, the etherial and subterhuman, the lofty and the debased, the refined and the vulgar, the mature and the immature. Viewed from higher perspectives, the ashes of cremated human beings are not mere ashes, but symbolic remains of the venerated and beloved, departed soul, the fragrant and cherished relic of the bygone one; viewed at the subterhuman and vulgar level, the ashes may appear to be nothing more than the sooty dust of a corpse; the values remnant of all that was once a human embodiment. Then, again, it has to be borne in mind that to the near and dear ones the mortal remains of a kindred being, whether buried or burnt to ashes, will have sentimental values which may not be shared by those unknown to and unconcerned with the deceased person. Profanity has blurred his vision and dwarfed the petitioner leading to failure of realisation of these higher values and instead made him think, ironically in the name of reason, that ashes of human beings have no value or significance.

8. In so far as great leaders are concerned, their services and sacrifices earn for them an everlasting place in the hearts and affections of men and women. Their thoughts and deeds leave an indelible imprint in the minds of people. On account of these factors, their mortal remains, even in the form of ashes, acquire value and command reverence. It would therefore be an error, and a colossal one at that, to think that the millions of people flocking to view the ashes, would be only viewing them 'qua ashes' and nothing more. The reality, however, is that they go to see the ashes to figurate in them the face, figure and form of the beloved leader, the reality that once was, but now reduced to ashes by the purifying fire, before being consigned to the elements as the inevitable place of return of all mortals. The petitioner, if he is able to elevate his thoughts and vision, will realise that the folly lies, not in the people attaching reverential value to the ashes of the departed soul, but in his limited and distorted perspective. Suffice, it, therefore, to say that the first contention of the petitioner merits a rightful dismissal.

9. The second and third contentions can be conveniently taken together and dealt with. The fundamental mistake manifest in the submissions of the petitioner is that, he overlooks the fact that in any democracy, and more so in India, proclaimed the largest democracy in the world, Government has to respond to the will and wishes of the people. Whenever there is a tragic demise of a beloved and respected national leader, there is spontaneous upsurge among the people to pay their homage and respect to the departed soul. While those residing in areas near the place of demise can trek or travel to the scene of cremation and pay their homage to the mortal frame, others living far away cannot do so. Their feelings of disappointment, anguish and pain at not being able to witness the funeral, have to be assuaged in some measure at least, and it is only for that purpose, the ashes of the cremated body are taken down round the country and placed at different centres. It is, therefore, the bounden duty of the Government to fulfil the aspirations of its people. Mankind's philosophy is not to commit the sin of ingratitude, for, as Saint Thiruvalluvar has said, there can be a salvation of any kind of sin, but not the sin of ingratitude. Therefore, no Government worth its name, much less a democratic Government, can be unmindful of the implorations of the people to pay their grateful homage to the memory of their departed national leader, and, since Government's money, is people's money, it has not only a right, but a duty to avail of public funds for defraying the

expenses for taking the sacred ashes to various parts of the country for being viewed by the public.

10. What remains last for consideration is the alleged embargo placed on a secular State's participation in profeased religious activities of any one religion, to wit, Hindu religion in this case. Here again, the proposition put forward contains a serious flaw. The word 'secular', among other things, means pertaining to the present world, or to things not spiritual, civil, not ecclesiastical; lay; not concerned with religion; not bound by monastic rules." A 'Secular State' means, a 'non-religious' and not 'irreligious' State. What follows is that the Government should not be wedded or bound to any one religion, but should give equality of treatment to every religion practised in the country. Article 15 of the Constitution proscribes the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The State is therefore bound to give protection and afford facility to various sections of people to practise and follow their religious customs. In the case of national leaders, when calamity or tragedy overtakes them, the State is obligated to arrange for their funeral and obsequies, in a manner befitting their status and in accordance with the pursuits of the particular religion to which the departed personality belonged. The performance of such duty by the State can, by no stretch of imagination, be characterised as non-secular activity. The argument of the petitioner to the contrary is, obviously based on a misconception. Therefore, this poser also, merits dismissal.

11. It is unfortunate that the petitioner, a self-professed rationalist, should have filed this petition accusing the Government and others of irrationality. The most learned of men have confessed that man's learning can at best be handful, but what is unlearnt is oceanful, therefore, an attempt to fathom the unfathomable by any one with his limited learning, will only take him beyond the realm of sanity. The petition has therefore, to be rejected. But, before pronouncing the operative line in the order I think it apposite to point out that, in his own way, though diabolically, the petitioner has also paid homage to the memory of the departed soul. In very few countries in the world, where the nation is wailing over the sad and untimely demise of a great leader, would a citizen like the petitioner be allowed to raise a jarring note regarding proprieties and legalities to be observed in the payment of tributes and homage to the departed leader. But, in our country, the Mahatma, Pandit Jawaharlal Nehru, other illustrious leaders, the founding fathers of the Constitution, and the late Prime Minister, have given to the people a true and vibrant democracy, which has enabled the petitioner to file this petition in the name of law and seek a verdict of Court on his untenable and irreverential contentions. In the comforting thought that the petitioner would at least realise this position, I decline the issue of a rule and dismiss the writ petition.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.A.Sathar Sayeed, J.*

*C.R.P.No.3887 of 1982.
24 th February, 1983.

Mayandi Chettiar *Petitioner**

v.

A.R.Senthilnathan *Respondent.*

(A) Civil Procedure Code (V of 1908), Order 21, rules 5 and 6 - Amending Act 104 of 1976 - Execution of a transmitted decree - Change of jurisdiction from the Court of the District Munsif to the Court of the Subordinate Judge - Execution petition returned by the District Munsif's Court pursuant to a direction by the District Judge and presented in the Sub-Court - Return of the petition whether valid - Erroneous direction of Court cannot prejudice the rights of the parties.

(B) Civil Procedure Code (V of 1908), section 39 - Applicability.

(C) Civil Procedure Code (V of 1908), section 115 - Powers of the Court not to be used to defeat the ends of justice, but to subserve - Maxim - Actus curiae neminem gravabit, Act of Court cannot prejudice parties.

The respondent in this case obtained an *ex parte* decree against the petitioner for a sum of Rs.33,000/- odd. The petition filed to set aside the *ex parte* decree was dismissed. The appeal preferred against the dismissal of the petition was allowed with a condition for payment of Rs.200/- as costs within six weeks from the date of the order. The condition was not complied with. The *ex parte* decree became final and an execution application for transmission of the decree to the District Munsif's Court, Karur was filed and the same was ordered. The papers were sent to the Disitrict Munsif's Court, Karur. While so, the Code of Civil Procedure was amended in and by which the decree pending before the District Munsif's Court Karur could not be executed by that court for want of jurisdiction. A petition was filed by the decree-holder before the District Judge and the petition was ordered for the return of the Execution petition to be presented in the proper Court. Thereafter the papers were presented to the Sub-Court, Karur having jurisdiction and the execution petition was numbered. Notices were sent to the judgment-debtor and it was contended that the execution petition filed in the Sub-Court, Karur was barred by limitation. However the Court held that the execution petition was not barred by limitation. Out of the three judgment-debtors two filed revisions against that order in the High Court and the same was dismissed. The other judgment-debtor filed a separate revision questioning the order passed in the execution petition.

Held:- In this case the order of the District Judge was not questioned by the revision petitioner at a higher forum. On a reading of the order of the District Court and also considering the act of the District Munsif it is seen that the entire mistake was committed by the Court and just because the Court had committed the mistake, the decree-holder respondent herein need not suffer on that score. The maxim *actus curiae neminem gravabit,* (act of Court should not harm the litigant) is applicable to the facts of the present case. The powers of the High Court under section 115, Civil Procedure Code, are not to defeat the ends of justice.

Case referred to:-

Jano Singh v. Brij Lal, A.I.R.1966 S.C. 1631= (1964)2 S.C.R.145.

S.Gopalaratnam, for *T.Chandrasekaran,* for Petitioner.

S.V.Jayaraman, for Respondent.

The Court made the following

ORDER:- The above revision is filed assailing the orders of the learned Subordinate Judge, Karur, made in E.P.No.50 of 1979 in O.S.No.21 of 1965,on 29th October,1980.

2. The facts of the case are as follows: The respondent in this revision filed O.S.No.21 of 1965 before the Sub-Court, Devakottai against the revision petitioner and others for the recovery of a sum of Rs.33,000 odd. An *ex parte* decree was passed on 30th April, 1966 against the petitioner and those who figured as defendants in the suit. I.A.No.315 of 1966 in O.S.No.21 of 1965 was filed by the petitioner and others to set aside the *ex parte* decree which petition was dismissed on 3rd October, 1966. Aggrieved by the order of dismissal, civil miscellaneous appeal was filed before this Court and this Court allowed the civil miscellaneous appeal on condition that the defendants in the suit should pay a sum of Rs.200 by way of costs to the decree-holder within six weeks from that date. That order was not complied with. Hence, the *ex parte* decree passed in the suit, had become final. Thereafter E.A.No.183 of 1974 was filed by the decree-holder on 26th August, 1974 before the Sub-Court, Devakottai, seeking an order to transmit the decree for execution to the District Munsif's Court, Karur. That was ordered on 26th September, 1974. The papers were sent to District Munsif's Court, Karur. While so, the Code of Civil Procedure was amended in and by which, the decree pending before the District Munsif's Court, Karur, could not be executed for want of jurisdiction. O.P.No.126 of 1974 was filed by the decree-holder before the District Judge, Tiruchy and in I.A.No.228 of 1978 an order was passed by the District Judge, Tiruchirapalli on 30th January, 1979 to the following effect:

> "Interim stay granted on 29th August, 1978 is vacated so that the trial Court may return the E.P. on petition to enable the petitioner to present the E.P. in proper Court."

I have quoted the order of the District Judge as it is, for much depends on the wording of the order. In pursuance of the aforesaid order passed by the District Judge, Tiruchy, E.P.No.111 of 1975 which was filed by the decree-holder before the District Munsif's Court, Karur was returned to the petitioner for presentation before the proper Court by his order, dated 27th February, 1979. Thereafter the papers in E.P.No.111 of 1975 which were returned to the respondent herein (decree-holder), were presented to the Sub Court, Karur having jurisdiction where the said execution petition was renumbered as E.P.No.50 of 1979. Notices were sent to the judgment-debtors on the same date including the petitioner herein. It was contended by the judgment-debtors before the Subordinate Judge, Karur that the execution petition filed by the decree-holder before the Sub-Court, was barred by limitation. The Sub-Court, Karur after framing points for determination, held that the execution petition is not barred by time and thus the Sub-Court negatived the contention of the petitioner and others by its order, dated 29th October, 1980. Thereafter the matter was posted for settlement of terms on 7th November, 1980. It may at this stage be stated that there were three judgment-debtors, namely, Mayandi Chettiar, Muthal Achi and Palaniappan. It is only Muthal Achi and Palaniappan who questioned the order of the Sub-Court, Karur in E.P.No.50 of 1979 dated 29th October, 1980 at the first instance, and in (sic) C.R.P.Nos.3233 of 1980 and 332 of 1981. Sengottuvelan, J. by a common order, dated 26th day of February, 1982 dismissed the two civil revision petitions.

3. Before Sengottuvelan, J. it was contended by the two judgment-debtors that the transferee Court can entertain the execution petition only in pursuance of an order of the transferor Court and, since, there is no order of a transferor Court in this case to transmit the decree to the proper Court, the execution petition is not maintainable. Incidentally it was also contended by the said judgment-debtors that the decree is barred by limitation. While referring to Order 21, rules 5 and 6, it was argued by the learned Counsel for the judgment-debtors before Sengottuvelan, J. that the act of the District Munsif, Karur in handing over the papers to the decree-holder direct for being presented to the proper Court is contrary to law and also contrary to the provisions stipulated by Order 21, rules 5 and 6, C.P.C. Sengottuvelan, J. on this aspect came to the conclusion that the contentions of the judgment-

debtors cannot be sustained and therefore, dismissed the aforesaid revision petitions filed by the petitioner.

4. The present revision petition is filed by another judgment-debtor (Mayandi Chettiar) who was left out, and who was one of the parties to E.P.No.50 of 1979 in O.S.No.21 of 1965 as a second line of litigation, questioning the order of the Executing Court, dated 26th October, 1980 on the only ground that the District Munsif's Court, Karur. has no jurisdiction to pass the orders in E.P.No.68 of 1979, dated 27th February, 1979 and that the order is passed contrary to the provisions of Order 21, rules 5 and 6, C.P.C. and that the Court below failed to note that the execution can be levied either by the Court which passed the decree or by the Court to which the decree is lawfully sent under section 39, C.P.C. read with Order 21, rules 5 and 6.

5. The only submission of Mr.Gopalaratnam, the learned counsel for the petitioner is that Order 21, rules 5 and 6 contemplated the mode of transfer of an execution petition to another Court for its execution. In this case the decree was transferred for its execution to the District Munsif's Court, Karur. But the District Munsif's Court finding that it had no jurisdiction, ought to have transmitted the papers to the Sub Court. Instead, the act of the Court in handing over the papers, on a petition filed by the decree-holder, direct to the decree-holder for being presented to the proper Court is illegal and contrary to the provisions of Order 21, rule 5, C.P.C. Much emphasis was laid by the learned counsel on the word "shall send" found in Order 21, rule 5, C.P.C. and it is on this ground that he contended that the execution papers should not have been handed over to the decree-holder by the District Munsif, direct; instead, the papers ought to have been sent through the process of court directly to the other Court, Sub-Court, Karur, having jurisdiction to execute the decree.

6. What happened in this case is that the decree was passed against the judgment-debtors for a sum of Rs.33,000 odd on 30th March, 1966. After obtaining the decree, the decree-holder filed E.A.No.183 of 1974, before the Sub-Court, Devakottai, to transmit the decree to the District Munsif's Court, Karur, which Court was having jurisdiction prior to the amendment of the Code of Civil Procedure. The papers were transmitted to the District Munsif's Court at Karur. But after the amendment, the jurisdiction vested with the Sub-Court, Karur and not with the District Munsif's Court. That had led the decree-holder to file O.P.No.126 of 1978 before the District Judge, Tiruchy and in I.A.No.228 of 1978 it was prayed that the decree be transferred to the Sub Court, Karur, since the Court of District Munsif, Karur had no jurisdiction to execute the decree in view of the amendment of the Code of Civil Procedure. The District Judge, Tiruchy passed the order extracted supra, to the effect that the trial Court may return the E.P. on a petition to enable (the decree-holder) the respondent herein to present the E.P. in proper Court. This order of the District Court enabled the respondent decree-holder to file E.A.No.68 of 1979 before the District Munsif's Court, Karur for the return of the E.P. and the papers were returned to the decree-holder direct which were presented on the same date to the Sub-Court, Karur which E.P. was renumbered as E.P.No.50 of 1979. In other words, the District Munsif, instead of transmitting the papers to the Sub-Court, Karur, returned the papers to the decree-holder in view of the order passed by the District Judge in I.A.No.278 of 1978, in O.S.No.126 of 1978. This order of the District Court, Tiruchy, was not questioned by the revision petitioner at a higher forum. On a reading of the orders of the District Court and also considering the act of the District Munsif, Karur. I am of the view, that the entire mistake was committed by the Court and just because the Court has committed the mistake, the decree-holder respondent herein need not suffer on that score. The maxim *actus curiae neminem gravabit* - (act of Court should do no harm to a litigant) is applicable to the facts of the present case. The abovesaid maxim has been more elaborately pointed out in a decision reported in *Jano Singh v. Brij Lal*, (1964)2 S.C.R.145= A.I.R.1966 S.C.1631 to the following effect:

"It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligations under a decree might be fulfilled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Court cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Court should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake."

7. That apart, the impugned order of the Sub-Court, Karur, was questioned by the other two judgment-debtors in C.R.P. Nos.3233 of 1980 and 332 of 1981 and the arguments that were advanced before me were put forth before Sengottuvelan, J. and the learned Judge has come to the conclusion that the subsequent E.P.No. 50 of 1979 filed by the decree-holder before the Sub-Court can only be taken as a continuation of the proceedings in E.P.No.111 of 1975 on the file of the District Munsif's Court, Karur, by virtue of the order of returning the papers by the District Munsif's Court, Karur, for presentation to the Sub-Court, Karur. I agree with the views of Sengottuvelan, J. expressed in C.R.P.Nos.3233 of 1980 and 332 of 1981.

8. That apart, I find that in so far as the facts of the present case are concerned, the decree-holder should not be penalised on a technical ground, as contended by the petitioner. It is not the case of the petitioner that the respondent has interpolated the dates in the execution petition. In fact no such allegations are made against the respondent herein. Therefore, the contention of the learned counsel appearing for the petitioner that the decree-holder violated the provisions of Order 21, rules 5 and 6, C.P.C. cannot be accepted on the particular facts and circumstances of this case. The powers of this Court under section 115, C.P.C. are not to defeat the ends of justice but to subserve. Under the circumstances, I am of the view that this revision petition has to be dismissed and it is accordingly dismissed. There will, however, be no order as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S. Mohan, J.*

*C.R.P.No.2145 of 1981. 11*th August*, 1982.

Lakshmana Perumal Naicker *Petitioner**

v.

Narayanaswami Naicker *Respondent.*

Tamil Nadu Debt Relief Act (40 of 1978), section 33(2) - Suit on a promissory note - Only half the money due claimed in view of Ordinance 5 of 1978 - Claim settled and satisfied under a receipt - Subsequent suit for balance of the amount held not maintainable.

Held:- The object of Tamil Nadu Act 40 of 1978 as well as Tamil Nadu Act 40 of 1979 is to give relief to the debtor and that it is the very reason why both the Acts are titled as Tamil Nadu Debt Relief Act. A careful reading of sub-section (2) of section 33 shows that the provisions of the Act 40 of 1979 do not in any way affect the earlier proceedings.

The effect of this is that full satisfaction has been entered into in relation to the debt evidenced by the promissory note executed by the defendant. Under these circumstances, it is not possible for the creditor to recover the balance. *[Para.4]*

Petition under section 25 of the Provincial Small Causes Court Act praying the High Court to revise the decree of the court of the District Munsif, Kovilpatti, dated 15th December, 1980 and passed in S.C.S.No.23 of 1980.

N.Varadarajan, for Petitioner.

N.Veluswamy, for Respondent.

The Court made the following

ORDER:- An interesting question arises in this civil revision petition. The facts are as follows: The petitioner as plaintiff preferred S.C.S.No.23 of 1980 for the recovery of a sum of Rs.463.25. The defendant (respondent-herein), admittedly, had borrowed a sum of Rs.600 from the plaintiff and executed a promissory note in his favour on 27th January, 1975, agreeing to pay the principal together with interest at 12% p.a. In view of the publication of Ordinance 5 of 1978, S.C.S.No.154 of 1978 on the file of the District Munsif's Court, Kovilpatti the suit was filed for recovery of Rs.392.95, that is, half towards principal and interest, and by passing the receipt Exhibit B-1 the claim was settled on 14th November, 1978 and the claim was satisfied. Thereafter, Tamil Nadu Act 40 of 1979 came into force. As per the provisions of the said Act, the plaintiff is entitled to recover the full amount as recited in the promissory note. Giving credit to the amount received under Ex.B-1, for the remaining amount, namely, Rs.463.25 the suit S.C.S.No.23 of 1980 came to be filed. In defence it was contended that the suit was not maintainable in law, in so far as Exhibit B-1 in full and final settlement of the claim due under the promissory note had been passed and since the claim was made in accordance with the provisions of Tamil Nadu Act 40 of 1978, a further suit will not lie merely because the Tamil Nadu Act 40 of 1979 contains different provisions.

2. The learned District Munsif who tried the suit was of the view that, though as per the provisions of Tamil Nadu Act 40 of 1978, a creditor was entitled to claim only half of the amount and that right could be enforced only in respect of half of the amount of the debt payable by the debtor, inasmuch as Ex.B-1 had been passed on 14th November, 1978, the present suit would not lie. This is because section 33(2) of Tamil Nadu Act 40 of 1979 states that the earlier proceedings would not in any way be invalidated. What was claimed in S.C.S.No.154 of 1978 having been paid fully and full satisfaction having been rendered, the present suit would not lie. It is to revise this order the plaintiff has come forward with this revision.

3. Mr.N.Varadarajan, learned counsel for the petitioner strenuously urged that the embargo or the disability under the provisions of Tamil Nadu Act 40 of 1978 having been removed by the provisions of Tamil Nadu Act 40 of 1979 on and from 14th July, 1978, the view of the court below cannot be held to be tenable. The construction placed on section 33(2) of Tamil Nadu Act 40 of 1979 is again wrong. In opposition to this, learned counsel for the respondent would state that the effect of passing of Ex.B-1, the full satisfaction memo would be that the present suit is barred. This is squarely covered by sub-section (2) of section 33 of Tamil Nadu Act 40 of 1979. The court below is right in its conclusion and no interference is warranted.

4. Having regard to these respective contentions it is necessary for me to refer to some of the provisions of Tamil Nadu Act 40 of 1979, called the Tamil Nadu Debt Relief Act, 1979. This Act repeals the earlier Act of the same title, namely the Tamil Nadu Debt Relief Act, 1978. By a reading of section 31 of Act 40 of 1979, it is seen that "the Tamil Nadu Debt Relief Act, 1978 (Tamil Nadu Act 40/78) except section 40 thereof (hereinafter referred to as the said Act) is hereby repealed". By this Act, namely, Tamil Nadu Act 40 of 1979, the liability of the debtor in relation to scaling down has been provided for under section 7 and sub-section (1) runs as follows:

> "Notwithstanding anything contained in any law for the time being in force or any contract or instrument having force by virtue of any such law and save as otherwise expressly provided in this Act, all debts payable by any debtor on the 14th day of July, 1978 shall be scaled down in accordance with the provisions of this chapter." (proviso omitted as unnecessary..

On this basis what is contended is that, inasmuch as Ex.B-1 was passed only on 14th November, 1978 and the defendant was a debtor on 14th July, 1978 for the remaining amount calculated on the basis of the promissory note, the present suit would lie. I am unable to accept this argument, because the object of Tamil Nadu Act 40 of 1978 as well as Tamil Nadu Act 40 of 1979 is to give relief to the debtors and that is the very reason why both the Acts are titled as Tamil Nadu Debt Relief Acts. It is at this stage section 33 of Act 40 of 1979 becomes very relevant and has a great bearing on the issue on hand. Section 33 runs thus:-

> "*Removal of doubts*:- (1) any liability incurred or arising under any debt due from a debtor shall be deemed never to have been discharged under the said Act, as if the said Act was not passed and every open debt shall be scaled down in accordance with the provisions of this Act.
>
> (2) Nothing contained in this section shall be deemed to invalidate any proceeding in which the order passed has been executed or satisfied in full before the date of the publication of this Act in the Tamil Nadu Government Gazette."

A careful reading of sub-section (2) above shows that the provisions of Act 40 of 1979 do not in any way affect the earlier proceedings. In this case Exhibit B-1 was passed on 14th November, 1978. That reads as follows:-

> "கோவில்பட்டியிலிருக்கும் அட்வகேட் ஸ்ரீ. A. V. லெக்ஷ்மணையா கோவில்பட்டி கஸ்பா இடைசெவல் நாச்சியார் புரத்திலிருக்கும் பால்குடி வெங்கடசாமி நாயக்கர் குமாரர் நாராயணசாமி நாயக்கர் அவர்களுக்கு கொடுத்த ஆதரவு?
>
> தங்கள் பேரில் வெயல் சுந்தரபுரம் கொரிசனு அழகர்சாமி நாயக்கர் குமாரர் லக்ஷ்மண பெருமாள் நாயக்கருக்காக ஹைகோர்ட் எஸ. சி. நெ: 154|78-ல் செய்த வியாஜ்ஜியத்திற்கு கோர்ட்டு முன்பு நாங்கள் இன்று செலுத்திய தொகை ரூ. 400|-ம் பெற்றுக்கொண்டு டிகிரி பூரா தீர்ந்துபோனதாக நாங்களும் நானும் சேர்ந்து அதில் எழுதி கொடுக்கப்பட்டு விட்டது.
>
> (Sd.) A.V.Lakshmanan,
> Advocate for plaintiff 14.11.1978".

The effect of this, as correctly understood by the Court below is that full satisfaction has been entered into in relation to the debt evidenced by the promissory note executed by the defendant on 27th January, 1975. Under these circumstances, it is not again possible for the creditor to recover the balance. The acceptance of the argument of the learned counsel for the petitioner would mean not affording relief to the debtor but virtual harassment as the debtor is being obliged to face successive suits as and when legislations are passed. That could not be the intendment, nor the object of these reliefs Acts. Therefore I see no reason to differ from the Court below. The Civil Revision Petition fails and is hereby dismissed without costs.

—— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*W.P.No.1457 of 1984 etc.
5 *th February*, 1985.

Kodaikanal Wattle Bark Vyaparikal Sangam represented by its President K.Abdul Salam
*Petitioner**

v.

State of Tamil Nadu represented by Commr. and Secy. to Govt. Forest Department, Fort St. George, Madras-9 and another
Respondents.

(A) Tamil Nadu Forest Act, 1882 (V of 1882), sections 2, 41 and 56 - 'Forest Produce' - Definition of - Whether includes 'Wattle bark' - Lessors of Pattadar - Peeling off Wattle bark, its collection, movement etc. - Transporting peeled wattle bark whether an offence - Right of Forest Officials to interfere.

(B) Tamil Nadu Hill Station (Preservation of Trees) Act, 1955 (XVII of 1955) - Tamil Nadu Preservation of Private Forests Act (XXVII of 1949) - Tamil Nadu Timber Transit Rules - Applicability to transit of forest produce.

Under section 2 of the Tamil Nadu Forest Act, 1882, "Forest Produce" has been defined to include "bark". Wattle bark would, therefore, be forest produce within the meaning of the Tamil Nadu Forest Act. While the Timber Rules govern the movement of timber as defined in the Act, there is no corresponding statutory provision or even rules with reference to the transit of forest produce. It therefore, follows that in the absence of any statutory provision or rules regarding forest produce, the forest officials are not in order in intercepting the collection, movement and transport of wattle bark collected by the lessors-pattadars. *[Para.5]*

The peeling off of wattle bark, its collection, its movement and transport by the lessees from the trees standing in the lands of the pattadars cannot be equated to commission of a forest offence. Therefore, the reliance placed by the State Government officials on section 41 is of no avail to them. *[Para.7]*

The presumption under section 56 of the Tamil Nadu Forest Act can apply only when proceedings are taken under the Act or the question arises in consequence of anything done under the Tamil Nadu Forest Act. It is the admitted case that no proceedings have been done by the respondents under the provisions of the Tamil Nadu Forest Act and therefore, no consequential question regarding the right of the Central or State Government to any forest produce, had arisen. Therefore, this section also, does not, in any manner, assist the Government. *[Para.7]*

The State Government or the Chief Conservator of Forests or his officials have no power either under the statute or any rule thereunder to regulate the peeling off, collection and transport of wattle bark by the lessees from the trees standing in the lands of the pattadars from whom they have taken the lease, and the officials of the State cannot, therefore, interfere with the right of the lessees from pattadars to peel off, collect move and transport the wattle bark either by insisting upon their obtaining a transport certificate or even otherwise. *[Para.8]*

S.Govind Swaminathan, V.Radhakrishnan, S.Venkataraman and Krishnamoorthy, for Petitioner.

E.D.Dakshinamoorthy, Govt. Advocate, for Respondents.

The Court delivered the following

ORDER:- These writ petitions, though at the instance of different petitioners, are dealt with together, as they involve a common question. It would suffice in this connection to notice the facts in W.P.No.10061 of 1984. The petitioner in that case had taken a lease from the pattadars of the right to peel off bark in the trees standing thereon. In the course of enjoying such rights as lessee, the

petitioner had been peeling off bark from Wattle trees, Bluegum trees, etc. The wattle bark thus peeled off by the lessee is packed and transported from the patta lands of the pattadars to the markets. In the process of moving the wattle bark and other bark so removed from the patta lands, the Forest officials stopped either the pattadars or lessees and obstructed the movement of the bark and even attempted to confiscate it, as if some provision of law had been violated. Claiming that wattle bark is not tree or timber and that the Timber Transit Rules would not apply, that as the lessees of the right to remove or peel off bark from the trees standing in the lands of the pattadar, they had the right to transport the park peeled off and that the forest officials had no authority whatever to obstruct them, the petitioners have prayed for the issue of a writ of mandamus directing the respondents and their officers and servants to forbear from interfering with the rights of the lessees to peel off, store and transport wattle bark to the market from the private patta lands of the lessor-pattadars.

2. In the counter affidavit filed by the respondents, they did not refer to any statutory provision under the Forest Act or the related enactments and the rules framed thereunder as justifying the interference with the movement of bark by the Forest officials. While accepting that wattle bark was collected by peeling off the bark from the matured wattle trees, which are grown in the Reserve Forests as well as patta lands, it was admitted in paragraph 2 of the counter affidavit that movement of bark may have to be regulated by the issue of transport certificates by the Ranger after verifying the origin of the bark. The respondents took the stand that though wattle bark is not timber as defined in the Tamil Nadu Forest Act, 1882, yet it would be forest produce and therefore, subject to the relevant provisions contained in the Forest Manual. The interceptions and checking of the movement of the bark by the officials of the Forest Department was stated to have been resorted to prevent illegal removal and illicit transport of wattle bark from the Government forests under guise of removal of the same from the trees belonging to the pattadars. The respondents therefore maintained that they were only attempting to check and prevent illegal transactions and unlawful acts and not to interfere in the lawful pursuit of business activities in wattle bark.

3. The learned counsel for the petitioners contended that there is no provision either in the Tamil Nadu Forest Act or other related enactments or the rules thereunder to prevent the peeling off and transport of wattle bark from the trees in the patta lands and that the respondents had no authority or power to intercept and obstruct the movement or the transport of the wattle bark collected for the wattle trees standing in the patta lands. The learned Government Advocate for Forest Cases, while frankly accepting that there is no statutory provision or rule in the matter of regulation of the movement of peeled wattle bark similar to Timber Transit Rules, however, submitted that wattle bark would be forest produce and relied upon sections 41 and 56 of the Tamil Nadu Forest Act to sustain the power of the Forest officials to check and intercept the movement of wattle bark.

4. The learned counsel for the petitioner in W.P.No.1457 of 1984 invited attention to the communications of the second respondent herein dated 14.2.1981 and 28.5.1981 to support the contention that wattle bark does not come under the description of "timber" and the Timber Transit Rules do not apply and therefore, the Forest authorities did not have the power to stop the movement of wattle bark peeled off from the trees standing in the patta lands of the private owners.

5. It is necessary at this stage to bear in mind the process by which the wattle bark is removed from the tree. Ordinarily the bark is peeled off from a standing tree and this does not involve the felling of the tree also. The collection of wattle bark is also admitted in paragraph 1 of the counter of the respondents. It is not the case of the respondents that unless the trees are felled, the wattle bark cannot be peeled. Therefore, the peeling off of the bark and the felling of the

tree are two distinct and unrelated operations. Under section 2 of the Tamil Nadu Forest Act, 1882, "timber" is defined as including trees when they have felled or have been felled, and all wood, whether cut up or fashioned or hollowed out for any purpose or not. It is not the case of either the petitioners or the respondents that the wattle bark trees have been felled or cut up or fashioned or hollowed out and therefore, the wattle bark would not fall within the definition of "timber". However, under section 2 of the Tamil Nadu Forest Act, 1882, "Forest Produce" has been defined to include "bark". Wattle bark would, therefore be forest produce within the meaning of the Tamil Nadu Forest Act. While the Timber Transit Rules govern the movement of timber as defined in the Act, there is no corresponding statutory provision or even rules with reference to the transit of forest produce. Indeed, the learned Government Advocate for Forest cases, was repeatedly asked whether there are such statutory provisions or rules governing the forest produce and he frankly admitted that there are no provisions either in the Act or in the rules governing forest produce. It therefore follows that in the absence of any statutory provision or rules regarding forest produce, the forest officials are not in order in intercepting the collection, movement and transport of wattle bark collected by the lessees from the trees standing on the lands of the lessors-pattadars.

6. Besides, it is seen from the communication, Reference No.T3/7034081-3 dated 14.2.1981 of the second respondent that wattle bark does not answer the description of timber and therefore, it is not correct to book cases of transport of the wattle bark from the private lands under Timber Transit Rules. That communication also calls upon all lower subordinates and staff empowered to detect offences to stop the booking of erroneous offences. In the subsequent communication, Ref.No.B/4/59327/81-2, dated 28.5.1981 issued by the second respondent, the removal of wattle bark from the Government forest under the guise of removal from the patta lands has been referred to and it is further stated that unauthorised felling of the trees, after the removal of the wattle bark and illicit removal of wattle bark from the Government forest, should be prevented by ensuring that necessary permission had been accorded. In paragraph 3 of that letter it has been stated that movement of bark may be regulated by the issue of transport certificate by the Ranger after certifying the origin of the bark and satisfactory compliance of the provisions of Tamil Nadu Hill Stations (Preservation of Trees) Act, 1955 and the Tamil Nadu Preservation of Private Forests Act as bark does not fall under the purview of Timber Transit Rules. It is at once clear that when the wattle bark is not timber even according to the second respondent and there are no statutory provisions or rules regulating the transport of forest produce like wattle bark, the second respondent was not in order in directing the regulation of the movement of wattle bark by the issue of certificates by the Ranger. It is true that every effort must be taken by the Government to see that the wattle bark from the trees standing in the forest belonging to the Government is not illicitly or illegally removed and transported; but at the same time, in the absence of conferment of powers either under the statutory provisions or the rules to regulate the collection, movement and transport of wattle bark collected by the lessees from the trees standing in the private lands of the pattadars, the Forest authorities cannot arrogate to themselves the power to regualte the same.

7. The reliance placed upon sections 41 and 56 of the Tamil Nadu Forest Act by the learned Government Advocate for Forest cases does not in any manner support the power to regulate. Section 41 enables a Forest Officer or a Police Officer to seize timber or forest produce together with all tools, ropes, chains, boats, vehicles, and cattle used in committing an offence when there is reason to believe that a forest offence has been committed in respect of the same. "Forest offence" has been defined as an offence punishable under the Act or any rule made thereunder. The peeling off of wattle bark, its collection, its movement and transport by the lessees from the trees standing in the lands of the pattadars cannot be

equated to commission of a forest offence. If under the guise of removing the wattle bark from the trees standing in the lands of the pattadars, the lessees peel off wattle bark from the trees standing in the forest belonging to the Government, then, that would be clearly a case of a commission of forest offence, i.e., theft of forest produce, in respect of which suitable action may be taken against the erring persons. But that cannot be pressed into service to claim that even when the lessees are engaged in the lawful activities of collecting the peeled wattle bark and transporting them in the exercise of their rights as lessees, they are committing an offence, to prevent which, the Forest officials have the power under section 41 of the Tamil Nadu Forest Act, 1882. Therefore, the reliance placed on section 41 is of no avail to the respondents. Similarly, the presumption indicated in section 56 which was also relied upon by the learned Government Advocate for Forest cases does not assist the respondents. If in the course of a proceeding taken under the Tamil Nadu Forest Act or in consequence of anything done under that Act, a question arises as to whether any forest produce is the property of the Central or State Government such produce shall be presumed to be the property of the Central or State Government until the contrary is proved. This presumption can apply only when proceedings are taken under the Act or the question arises in consequence of anything done under the Tamil Nadu Forest Act. It is the admitted case that no proceedings have been taken under the provisions of the Tamil Nadu Forest Act and that nothing also has been done by the respondent under the provisions of the Tamil Nadu Forest Act and therefore, no consequential question regarding the right of the Central or State Government to any forest produce, had arisen. Therefore, this Section also, does not, in any manner, assist the respondents.

8. It is thus seem that the respondents have no power whatever either under the statutes or any rule thereunder to regulate the peeling off, collection and transport of wattle bark by the lessees from the trees standing in the lands of the pattadars from whom they have taken the lease and the respondents cannot, therefore, interfere with the right of the petitioners to peel off, collect, move and transport the wattle bark either by insisting upon their obtaining a transport certificate or even otherwise. Under those circumstances the petitioners are entitled to the issue of a writ of mandamus as prayed for. Consequently, the rule nisi is made absolute and all the writ petitions will stand allowed and there will be a direction to the respondents and their officers and servants to forbear from interfering in any manner with the right of the lessees-petitioners to peel off, store and transport the wattle bark to the market from the patta lands of the lessors. There will be no order as to costs

R.S. —— *Petitions allowed.*

[Full Bench]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.N.Chandurkar, C.J. and T.Sathiadev and S.A.Kader, JJ.*

*W.A.No.462 of 1981 and W.A.Nos.575 to 578 of 1982 and W.P.Nos.6401 of 1984 etc. *26th October, 1985.*

Syed Mohideen *Appellant**

v.

Govt. of Tamil Nadu by Commr. and Secty. to Govt. Rural Development and Local Administration, Madras and another
Respondents.

(A) Constitution of India (1950), Article 309 - Tamil Nadu Ministerial Service Rules and Special Rules for Tamil Nadu

Ministerial Service, Rule 35 (q) and Rule 35(1) - Scope - Persons employed in Panchayat Union Offices such as Manager, Accountant etc - Reversion on the ground of their not passing the qualifying tests - Postponement of their increment etc whether legal - Further promotions and seniority depend upon their passing their tests.

(B) Constitution of India (1950), Article 226 - Writ Petition allowed on question of seniority - Appeal by State whether competent.

(C) Evidence Act (I of 1872), sections 11 and 115 - Res judicate - Principles as to - No estoppel against the State.

(D) Words are Phrases - "Stare decisis" - What is.

Held: There is no doubt that the assumption that the G.O.Ms.No.2155, dated 16th October, 1964 was a statutory rule is wholly unjustified. Merely because in an earlier litigation between one of the Government employees and the Government, the court had wrongly assumed that G.O.Ms.No.2155, had statutory force, it is difficult to see how the State Government would be precluded from contending to the contrary and bringing to the notice of the Court in a subsequent litigation in the form of a writ petition filed by another employee, that the said G.O.Ms. No.2155, was in fact, not a statutory Rule and did not have any statutory force, not having been issued in the exercise of the power conferred under the proviso to Article 209 of the Constitution of India. *[Para.20]*

Merely because at one stage the court had proceeded on the footing that a particular rule has a statutory status, when in fact that rule did not have the sanction of the proviso to Article 309 of the Constitution of India, one fails to see how the failure of the Government to appeal against the earlier decision could prevent the Government from contending that G.O.Ms.No.2155, could not be treated on the same footing as a rule framed by the Governor under the proviso to Article 309 of the Constitution. The failure to appeal against such a finding cannot have the effect of giving the rule, the status of a statutory rule and the Division Bench was in error in holding that the Government could not contend to the contrary, more so when it has been established and, indeed, could have been established even before the learned Judges of the Division Bench, that G.O.Ms.No.2155, was in fact not made by the Governor at all in the exercise of the power conferred under the proviso to Article 39 of the Constitution of India. *[Para.20]*

The principles of *res judicata* do not apply to such a case, because strictly, the petitioners were different. There could not have been any estoppel against the State, much less in respect of rules which were promulgated later in the exercise of power under the proviso to Article 309 of the Constitution. From this infirmity will also follow the second infirmity, namely that, if there are service rules which are made under the proviso to Article 309 of the Constitution, then whether one likes it or not, unless they are challenged as being *ultra vires*, the Court is bound to give effect to such rules. *[Para.20]*

The proposition that a decision *per incuriam* need not be followed as a binding precedent is well established. The Court is not bound to follow a decision of its own if given *per incuriam* "A decision is given *per incuriam* when the court has acted in ignorance of a previous decision, of its own or of a court of a co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the superior court. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the superior court. To the above type of cases must also be added decisions which are rendered without noticing the crucial and relevant statutory provisions and rules governing the relevant controversy. *[Paras.23,24]*

II. The Government took an administrative decision regarding G.O.Ms.No.1678, dt. 7th July, 1966, with regard to the requirement of passing the department test. This administrative decision would hold the field only till such time as statutory rules

under the proviso to Article 309 of the Constitution were made. Once statutory rules came to be made by the notification dt. 28th August, 1973, and it was expressly made retrospective with effect from 16th October, 1964, the Government had deprived itself of its power to take any different administrative decision and, hence, the rights of the concerned Government employees, would have to be determined only on the basis of the relevant statutory rules. Therefore, in so far as appointments and promotions to the posts of Managers, Accountants and Assistants in Panchayat Union Offices, etc. are concerned, if it is found that the matter is squarely dealt with by Rules made under Article 309 of the Constitution of India, the rights will have to be determined in accordance with those rules only. It is in this context that rules 35(q) and 35 (r) become very relevant. *[Para.26]*

III. Seniority is one of the important matters relating to the conditions of service because it has a direct bearing on the question of promotion to the next higher grade. Where promotion to the next higher grade is based on the principles of seniority and merit, the seniority of an official becomes important, because where a senior official is suitable for promotion, he is entitled to get promotion on the basis of his seniority in preference to juniors. Even in cases where promotion is based on selection, seniority is also important, and because where persons are selected to the next higher post on the basis of merit and suitability from among persons of equal merit, a senior is entitled to be preferred for appointment. *[Para.43]*

The general principles, for fixing seniority are now well established. Seniority is always counted from amongst persons holding similar status. Persons holding permanent or substantive posts are always treated as seniors to persons holding appointments on temporary or officiating posts. On this basis, those who were already covered by rule 35(q) would be seniors to those appointed to their respective posts after 16th October, 1964. *[Para.44]*

IV. It is not possible to accept the view of the Division Bench in W.A.Nos.394 to 396 of 1979 that when a particular power of the State Government for making a seniority list has been struck down by the High Court, the State Government cannot be said to be an aggrieved party entitled to challenge the correctness of that decision before the appellate court on the ground that the Government's policy decision was a right decision. The only forum where the State Government, whose policy decision has been struck down by a single Judge, can challenge that decision is the Division Bench where the State Government must come by way of appeal. *[Para.46]*

As a result of making Rule 35(q), any person who was already promoted to the post, of Manager, Accountant, or Assistant in the Panchayat Union Offices or the Post of Accountant or Assistant in the Panchayat Development Branch of Collectorates and the Panchayat Development Section of Revenue Divisional Offices as on 16.10.1964 could not be reverted, notwithstanding the fact that he has failed to pass the qualifying tests. *[Para.47]*

The consequence of such failure to pass the qualifying test was simply that his increments are postponed without cumulative effect until he passed the said tests. His further promotions and seniority would be dependent upon his passing the tests. *[Para.47]*

As to the correct construction to be placed on Rule 35(q) and Rule 35(r) added on 28th August, 1973 to the Special Rules for the Tamil Nadu Ministerial Service, framed under Article 309 of the Constitution, and the correct application of these Rules See Para 47. *[Para.47]*

G.O.Ms.No.1581, dated 20th October, 1982, giving guidelines as to how G.O.No.783 dated 30th April, 1981, is to be implemented, is no longer effective and operative.

Cases referred to;-

Young v. Bristol Aeroplane Co. Ltd, (1944)2 All.E.R.293; *Jeisri v. Rajdewan,* (1962) 1 S.C.J.578: (1962)1 M.L.J. (S.C.) 258: (1962)1

An.W.R. (S.C.) 258: (1962)2 S.C.R.558: A.I.R.1962 S.C.83; *Vijayadevaraj v. G.V. Rao*, (1983)1 S.L.R.292: (1982)2 Karn.L.J.97: (1982)2 S.L.J.399, *Sant Ram Sharma v. State of Rajasthan*, (1968)1 S.C.J.672: (1968)1 S.C.R.111: A.I.R.1967 S.C.1910; *Venkataraman v. Director of Postal Services*, (1970)2 M.L.J.49.

K.Doraiswami, P.Sathasivam and Muthukrishnan, for Appellant.

K.Ramamurthy, Desappan, Sukantharaj, Muthu Ramalingam, for Petitioner.

Selvaraj, Govt. Pleader, for the State, for Respondent.

The Judgment of the Court was delivered by

Chandurkar, C.J.:- The question which arises for decision before this Full Bench is whether the Government Order No.783 issued by the Rural Development Department on 30th April, 1981, giving effect to the guidelines with regard to the determination of seniority of persons who were appointed in the Panchayat Development Units in the Tamil Nadu Ministerial Service is constitutionally valid. Since the impugned Government Order was issued by the Government admittedly with a view to give effect to the decision of a learned single Judge of this Court in W.P.Nos.401, 402 and 403 of 1975 decided on 12.12.1977, which was confirmed by a Division Bench of this Court while disposing of Writ Appeals Nos.394 to 396 of 1979, filed by the State Government, District Collector of Salem, and the Director of Rural Development, Madras, and since the contentions raised on behalf of the appellant in W.A.No.462 of 1984, which was taken up along with the writ petitions which raise the same point, challenge the correctness of the judgment of the learned single Judge, as confirmed by the Division Bench, thus Full Bench is necessarily called upon to consider the correctness of the view of the learned single Judge, as confirmed by the Division Bench of this Court.

2. At the very outset it may be stated that at the instance of three petitioners, G.O.Ms.No.862 dated 27.4.1968, which dealt with Managers and Accountants, who were appointed subsequent to 16.10.1964, was called in question, because according to the petitioners before the learned judge, G.O.Ms.No.862 was given effect to and the petitioners were reverted from the post of Manager to the Post of Accountant, Panchayat Union. The learned Judge by his order, to the details of which we shall refer later, held that the reversions were bad and that the petitioners before him were entitled to seniority on the basis of the dates on which they had acquired the requisite qualifications prior to their being posted as Managers.

3. In order to appreciate the controversy which has given rise to the several writ petitions filed in this Court consequent upon the Government issuing G.O.Ms.No. 783, dated 30th April, 1981, it is necessary to state certain earlier events and make a reference to the several steps taken by the State of Tamil Nadu while absorbing the erstwhile employees of the District Boards and other Local Authorities by the constitution of three different cadres known as (i) Panchayat Development Unit under the Madras Ministerial Service; (ii) Madras Gram Sevak Service; and (iii) Madras Panchayat Development Subordinate Service.

4. Initially by G.O.Ms.No.2155, dated 16.10.1964 these three cadres were constituted by the State Government by an administrative order. By this Order the Government directed that the Departmental Unit-Item (xi) (Local Administration Department in R II of the Madras Ministerial Service Rules should be re-named as Panchayat Development Unit. This Unit would include the posts of Upper Division Clerks (later called Assistants), Accountants and Managers of Panchayat Union Offices, Lower Division Clerks (later designated as Junior Assistants), Assistants/Upper Division Clerks and Accountants in the Panchayat Development Branches in the Collectorates and in the Panchayat Development Sections in the Revenue Divisional Offices. By the same order the Madras Gram Sevak Services was created in each Revenue District consisting of the posts of Gram Sevaks and Executive Officers of Town Panchayats. The consti-

tution of the Panchayat Development unit in the Madras Ministerial Service was given in clause 5 of this Government Order. So far as we are concerned, the first category of posts was Managers in Panchayat Union Offices and Accountants in Panchayat Development Sections in Revenue Divisional Offices and in Panchayat Development Branches in Collectorates. The second category was Upper Division Clerks and Accountants in Panchayat Union Offices and other offices specified above. The third category was Lower Division Clerks in Panchayat Development Section in the above mentioned offices. The mode of appointment prescribed for Category I was by promotion from Category II, to Category II by promotion from Category III; and to category III by direct recruitment. Sub-clause (e) of Clause 5 prescribed the tests. This clause reads as follows:

> "5. (3) *Tests:* No person shall be appointed to the posts of Accountants and Managers in Panchayat Union Offices and the posts of Accountants in Panchayat Development Sections in Revenue Divisional Offices and the Panchayat Development Branches in District Collectorates, unless he has passed both the 'Departmental Test in Panchayat Development and the Panchayat Development Account Test."

It is to be noted that these tests were restricted to the posts of Accountants and Managers, and it was not till November, 1972 that retrospectively the tests were made a condition precedent for appointment to the post of Assistants. This Government Order was amended on 13.9.1966 by introducing sub-clause (g) in clause 5, and the amendment stated:

> "Nothing contained in this order shall adversely affect any person holding any of the posts referred to in sub-paragraph (1) of paragraph 4 as on the date of issue of these orders."

The effect of this Government Order as on 16.10.1964 was that, if an Assistant, i.e. Upper Division Clerk, wanted to be promoted to the post of Accountant and Manager, he had to pass the prescribed tests. The details of these tests, with which we are not concerned, were notified by G.O.Ms.No.101, dated 16.1.1965. Later, when it was noticed that, even though the passing of the test was a condition precedent for appointment as Managers and Accountants, but that the prescribed examination was held for the first time only in November, 1965, with the result that the holders of the posts of Managers and Accountants were unable to qualify themselves, the Government decided by G.O.Ms.No.1678 dated 7th July, 1966 to give four chances to the persons concerned to qualify. The Government directed that, if a person who was already Manager or Accountant, failed to pass the departmental test and account test within the first four chances, his increment would be postponed without cumulative effect until he passed the test.

5. The next order made by the Government is of some importance. The Government issued G.O.Ms.No.862 dated 27th April, 1968. By this Order the Government took a decision that such of those Managers and Accountants who were appointed subsequent to 16.10.1964 could pass the departmental tests on or before the examination to be held in November, 1969, and that, as a matter of concession, the passing of the departmental tests shall not be insisted upon as a qualification for appointment as Managers till December, 1969. The obvious effect of this decision was that such of those Managers and Accountants, who were appointed as on 16.10.1964, could continue in their office, notwithstanding the fact that they had not passed the prescribed tests and they were given a locus to hold office subject to the condition that they should pass the examination before November, 1969. It has to be noticed that this was an administrative order issued by the State and this decision ultimately took the form of a statutory rule under Article 309 of the Constitution of India, on 28.8.1973. By a notification issued by the Government in exercise of its powers conferred by the proviso to Article 309 of the Constitution of India, the Governor made certain amendments to the Special Rules for the Tamil Nadu Ministerial Service Manual, (Section 22 in Volume III of the Madras Service Manual, 1970).

One of the amendments was that in Rule 11 for item (XXIV) Rural Development and Local Administration Department", new entries specifying the Panchayat Development Department and their units thereunder, the details of which are not necessary, were substituted. Two sub-rules (q) and (r), were added under rule 35. These rules run as follows:

"(q) If any person holding the post of Manager or Accountant or Assistant in Panchayat Union Offices or the post of Accountant or Assistant in the Panchayat Development Branch of the Collectorates and in Panchayat Development Section of Revenue Divisional Offices as on 16th October, 1964 fails to pass the Departmental test and Panchayat Development Account Test within the first four chances, their increments shall be postponed without cumulative effect until they pass the said tests.

(r) Such of those persons who were appointed subsequent to 16th October, 1964, as Manager/Accountant/Assistant in Panchayat Union Offices or as Accountant/Assistant in the Panchayat Development section in Revenue Divisional Offices and in Panchayat Development Branch in the Collectorate, if they do not pass the tests before 31st December, 1969, shall be reverted.

6. Later by an amendment a proviso was added to rule 35 (r), which runs as follows:

"Provided that persons selected from the Panchayat Union Service by the Screening Committee and appointed as Assistant fail to pass the tests before the 31st December, 1969 shall not be reverted to the Panchayat Union Service but their increments shall be postponed without cumulative effect until they pass the tests."

Though this proviso was made on 9.3.1974, the amendment was expressly made retrospective with effect from 16.10.1964, as was also the case with the substantive amendment to Rule 35 by introducing sub-rule (q) and (r) by a notification dated 28th August, 1973. Prior to this, that is, on 6th November, 1972, when it was noticed that, though the Government Order dated 16.10.1964 directed that "necessary amendments to the Madras Ministerial Service Rules will be issued by the Public (Services) Department", but that no such notification under the proviso to Article 309 of the Constitution was issued, a notification came to be issued in G.O.Ms. No.2336, RD & LA on 6th November, 1972, notifying the rules made by the Governor of the State of Tamil Nadu in exercise of the powers conferred by the proviso to Article 309 of the Constitution. These rules were applicable to three categories of posts, namely, Managers in Panchayat Union Offices, Assistants and Accountants in Panchayat Union Offices, and Junior Assistants in Panchayat Development sections, and other persons specified in those rules. These rules prescribed the mode of appointment, which were the same as in G.O.Ms.No.2155, dated 16.10.1964. These rules were specifically intended to give statutory effect and force with effect from 16.10.1964 to the decision of the Government contained in G.O.Ms. No.2155, dated 16.10.1964, with one additional fact namely, that it also dealt with the appointment to the post of Assistant, as already referred to.

7. On 28.4.1974 another notification came to be issued in G.O.Ms.No.883 RD & LA in the name of the Governor under the proviso to Article 309 of the Constitution of India, which again was made retrospectively operative from 16.10.1964, and it was directed that the rules, dated 6.11.1972 G.O.Ms.No.2336 should be treated as *ad hoc*, as they were not self-contained. In the absence of specific provision requiring that the general and special rules applicable to holders of permanent posts in the Tamil Nadu Ministerial Service shall apply to the Ministerial Posts in the Panchayat Development Unit, an amendment came to be made to the rules published on 28th April, 1973, by adding the following preamble:

"The General and Special Rules applicable to the holders of permanent posts in the Tamil Nadu Ministerial Service shall apply the Ministerial posts in the Panchayat Development Unit, subject to the following notification."

(ii) For rule 1 the following rule shall be substituted, namely:-

> "*Constitution:* These rules shall apply to the following categories of posts and shall be treated as temporary additions to the corresponding posts in the Tamil Nadu Ministerial Service:
>
> *Category (i):* Managers in Panchayat Union Office, Accountants in Panchayat Development section in Revenue Divisional Offices and in Panchayat Development Branches in Collectorates.
>
> *Category (ii):* Assistants and Accoutants in Panchayat Union Offices, Assistants in Panchayat Development Sections in Revenue Divisional Offices and in Panchayat Development Branches in Collectorates.
>
> *Category (iii):* Junior Assistants in Panchayat Development Sections in Revenue Divisional Offices and in Panchayat Development Branch in Collectorates.

These are the rules which are now relevant.

8. Coming to the facts of W.P.Nos.401, 402 and 413 of 1975, which were filed by three petitioners, the judgment of the learned single Judge shows that the petitioner in the first writ petition had qualified himself to be promoted as Manager as early as November, 1965 in accordance with the requirements of G.O.Ms.No.2115, dated 16.10.1964 and the other two petitioners had qualified themselves by passing the requisite tests as early as in May, 1966 which according to them, enabled them to be posted as Managers; and they were in fact posted as Managers.

9. The grievance of the petitioners was that as a result of the implementation of G.O.Ms.No.862 dated 27.4.1968 all the qualified junior persons were reverted from the post of Manager and preference was given to seniors who were unqualified persons. This reversion was challenged by one of the petitioners in W.P.No.571 of 1969. In that writ petition, the petitioner Nagarajan, expressly asked for the quashing of G.O.Ms.No.862 dated 27.4.1968. The learned Judge held that G.O.Ms.No.862 dated 27.4.1968 purported to make a change in the statutory rules by a mere administrative order and that the Government therefore, could not give effect to G.O.Ms.No.862. It was contended before the learned Judge in W.P.No.571 of 1969 on behalf of the Government that in Salem District from where the petitioner came there was no person who had become qualified earlier to persons occupying the posts of Managers and Accountants and who were reverted as a consequence of G.O.Ms.No.862 dated 27.4.1968 and that it was therefore enough if a mere writ of *mandamus* was issued directing the Government to restore the petitioner to the post of Manager. The learned Judge accepted the suggestion, and the judgment shows that G.O.Ms.No.862 was not expressly quashed, but the Government was directed to restore the petitioner to the post of Manager. The petitioner Nagarajan was restored as Manager on 8.5.1970. However, when the statutory rules were brought into force retrospectively by G.O.Ms. No.2336 dated 6.11.1972, two other petitions came up before Mohan, J. who heard W.P.No.401 of 1975, and making a reference to some of the G.Os. the learned Judge directed that the inter-seniority should be refixed in accordance with the legal position contained in G.O.Ms.No.2155 which was presumed to contain statutory rules. Consequent upon giving effect to the new statutory rules as promulgated by the notification dt. 6.11.1972, petitioner Manoharan got reverted and it was this reversion which he made a grievance of before Mohan, J. After referring to promotions and reversions made, and, when it was not disputed before the learned Judge that the petitioners had qualified themselves to become Managers by passing the requisite tests and that the reversions were justified because the respondents in the case had passed the examination within the due dates, that is, before 31st December, 1969, and that having regard to the fact that they were seniors to the petitioners in the lower cadre the respondents were entitled to be promoted first in preference to the petitioners, the learned Judge observed as follows:

"There is no rule which enables the authority to place the respondents 4 to 7 as seniors merely because they were so in the lower cadre. Admittedly the petitioners had qualified themselves to the post of Managers long before respondents 4 to 7 by passing the required tests. It is not necessary for me to deal with the nature of G.O.Ms. No.2155 R.D. & L.A. dated 16.10.1964 and G.O.Ms.No.862 R.D. and L.A. dated 27.4.1968. Since it is clearly admitted that there is no rule which enables the authority to take on the seniority of respondents 4 to 7 in the lower cadre to that of Manager, I may incidentally state that G.O.Ms.No.2155 R.D. & L.A. dated 16.10.1964 has already been held to be statutory by this Court. Once, therefore, if the petitioners had qualified themselves earlier to be posted as Managers their seniority will have to be reckoned from the date of attaining these qualifications. Therefore the impugned orders will have to be necessarily quashed and they are quashed."

10. It has to be pointed out that when the learned Judge referred to G.O.Ms. No.2155 dated 16.10.1964 as already having been held to be statutory by this Court, the learned Judge was referring to the decision of Alagiriswami, J. in W.P.No.571 of 1969.

11. The learned Judge assumed that the Government Order dated 16.10.1964 was statutorily issued under the proviso to Article 309 of the Constitution of India, an assumption, which, it is not disputed, was wholly unwarranted and unjustified.

12. Now the Government filed appeals against the order of Mohan, J. in W.A.Nos. 394 to 396 of 1979. These appeals, however, came to be summarily dismissed at the admission stage, on two grounds. The Division Bench, assumed once again that G.O.Ms.No.2155, dated 16.10.1964 had statutory force and observed that this view of Alagiriswami, J. was allowed to become final, because the Government did not file any appeal. This is clear from the following observations of the Division Bench (p.110):

"It is not in dispute that on an earlier occasion this Court had taken the view that G.O.Ms.No.2155, Rural Development and Local Administration, dated 16.10.1964 was statutory and that view of this Court was allowed to become final by not preferring any appeal."

13. In view of this the Division Bench found that the learned Judge could not be said to have committed any error in following that decision and on that basis holding that the petitioners in the writ petitions had become qualified for appointment as Managers earlier than respondents 4 to 7 admittedly there being no rule to prefer respondents 4 to 7 on the ground that they were senior to the petitioners in the writ petitions in the lower cadre of Accountant. The Division Bench thus dismissed the appeals.

14. The second ground on which the writ appeals came to be dismissed, and rather unfortunately, was that the State Government could not be said to have been aggrieved by the Judgment of the learned Judge and therefore the appeal was not tenable. The relevant observations are as follows:

"In any event, there being no charge that the petitioners in the writ petitions were disqualified or inefficient or were not honest in the performance of their duties, if at all any person who could be said to have been aggrieved by the order of the learned Judge, it is respondents 4 to 7 and the State cannot be said to have been aggrieved. From this point of view also, we see no justification for admitting these appeals, and hence, these appeals are dismissed."

15. There is no doubt that the judgment of Mohan, J. confirmed by the Division Bench, laid down a principle for the determination of seniority. The State Government implemented the decision of Mohan, J. by issuing G.O.Ms.No.783 dated 30th April, 1981. The State Government's reading of the Judgment of Mohan, J. is indicated by the following passage in the preamble to the Government Order in paragraph 2:

"The High Court allowed the writ

petitions with a direction to the Government that the writ petitioners who had qualified themselves earlier ought to be posted as Managers over the unqualified persons and that their seniority would have to be reckoned from the date of their acquiring the test qualification."

16. The impugned Government Order refers to the appeal of the State being dismissed by the Division Bench. Consequent upon this decision of the High Court the State Government decided that "the seniority of Accountants/Assistants/Managers in the Panchayat Development Units be fixed with reference to the dates of their acquiring the test qualifications. The Director of Rural Development is requested to take action accordingly.

17. This impugned G.O.Ms.No.783 admittedly affects adversely several of these persons who held the posts of Managers or Accountants for whose benefit sub-rules (q) and (r) were added in Rule 35 of Special Rules. Hence a large number of writ petitions had been filed in this Court making a grievance of the impugned G.O.Ms.No.783 as adversely affecting them. The appellant in W.A.No.462 of 1981, whose case is symbolic of the common grievance which is made on behalf of the several writ petitioners in this Court, was appointed as Assistant on 2.10.1961. He had passed the required tests in November, 1968. When the original seniority list was made in accordance with G.O.Ms.No.862, dated 27.4.1968, he stood at serial No.25. However, when the new seniority list was sought to be prepared while implementing the impugned G.O.Ms.No.783 issued in order to implement the decision of this Court, his seniority went down to No.54. The appellant has filed in his original writ petition a list of Assistants appointed prior to 16.10.1964, who were originally promoted from the cadre of Junior Assistants, and the entries of that list would highlight the fact that by giving effect to the principle that seniority should be determined with reference to the date of passing the qualifying tests, the very purpose of sub-rules (q) and (r) would be defeated, and these rules would be set at nought. In view of the consequences which flowed from the G.O.Ms.No.783, dated 30.4.1981, the appellant Syed Mohideen filed the writ petition. The learned Judge, who heard that petition, took the view that the State Government could not overlook the decision of the Division Bench of this Court in W.A.Nos.394 to 396 of 1979 and since the seniority was fixed in accordance with the guidelines laid down in the judgment of this Court, the petition had to be dismissed. That is how the appeal has been filed against that judgment.

18. Since common questions were involved in these petitions and the writ appeal though the main argument was advanced in the writ appeal by Mr.K.Doraiswami, we have heard Mr.Sukantha Raj, Mr.M.P.Chidambaram, Mr.Desappan, Mr.Muthuramalingam, Mr.Ramamurthi and Mr. Radhakrishnan on behalf of the petitioners, and Mr.Selvaraj, Government Advocate, on behalf of the Government.

19. It is now conceded by all concerned, that the impugned Government Order had necessarily to be issued by the Government in order to give effect to the judgment of Mohan, J, confirmed by the Division Bench. What is, however, argued before us is that the decision of Mohan, J. as well as the decision of the Division Bench must he considered as a decision *per incuriam*, inasmuch as not only does it proceed on the assumption that G.O.Ms. No.2155, dated 16th October, 1964, is a statutory rule, but that the statutory rules framed on 6.11.1972, 28.4.1973, 28.8.1973 as well as 9.8.1974, have not at all been considered. Learned counsel have, therefore, contended that the view taken by Mohan, J. that for the purpose of seniority the date of acquiring the qualification or passing the qualifying test should alone be the relevant date, should not be considered as binding, and, in any case, according to learned counsel, the said decision needs to be overruled, as also the decision of the Division Bench which confirmed the decision of Mohan, J.

20. Now there is no doubt that the assumption that G.O.Ms.No.2155, dated 16.10.1964 was a statutory rule is wholly unjustified. Merely because in an earlier litigation between one of the Government

employees and the Government, the Court had wrongly assumed that G.O.Ms.No.2155, dated 16.10.1964 had statutory force, we fail to see how the State Government was precluded from contending to the contrary and bringing to the notice of the Court in a subsequent litigation in the form of a Writ Petition filed by another employee that G.O.Ms.No.2155, dated 16.10.1964, was, in fact, not a statutory Rule and did not have any statutory force, not having been issued in the exercise of the power conferred under the proviso to Article 309 of the Constitution of India. Merely because at one stage the Court has proceeded on the footing that a particular rule has a statutory status, when in fact that rule did not have the sanction of the proviso to Article 309 of the Constitution of India, we fail to see how the failure of the Government to appeal against the earlier decision could prevent the Government from contending that G.O.Ms.No.2155, dated 16.10.1964 could not be treated on the same footing as a rule framed by the Governor under the proviso to Article 309 of the Constitution. The failure to appeal against such a finding cannot have the effect of giving a rule, which does not have its source in a constitutional power, the status of a statutory rule, and in our view, the Division Bench was clearly in error in holding that the Government could not contend to the contrary, more so when it has been established and, indeed could have been established even before the learned Judges of the Division Bench, that G.O.Ms.No.2155, dated 16.10.1964 was in fact not made by the Governor at all in the exercise of the power conferred under the proviso to Article 309 of the Constitution of India. This one circumstance, in our view, is enough to create a serious infirmity in the decision of the Division Bench, as well as the decision of Mohan, J. The principles of *res judicata* do not apply to such a case, because strictly, the petitioners were different. There could not have been any estoppel against the State, much in respect of rules which were promulgated later in the exercise of power under the proviso to Article 309 of the Constitution. From this infirmity will also follow the second infirmity, namely that if there are service rules which are made under the proviso to Article 309 of the Constitution, then whether one likes it or not, unless they are challenged as being *ultra vires*, the Court is bound to give effect to such rules. Neither the judgment of Mohan, J. nor that of the Division Bench shows that the very relevant and important rules, *i.e.* rule 35(q) and 35(r), which were framed by the State Government relating to certain categories of Managers and Assistants, have been noticed. Managers and Assistants, or Accountants, for whose benefit these rules have been made, are entitled to the benefit of those rules, and they cannot be prevented from enforcing their rights under those rules, merely on the ground that those rules had not been brought to the notice of the Court on an earlier occasion when a similar question arose, or that the State Government had not appealed against the earlier judgment, which was based on a wholly erroneous assumption. It also appears that, when a similar matter came up before K.N.Mudaliar, J. in W.P.Nos.2905 and 2550 of 1970, the learned Judge took notice of these rules, and he directed the State Government to fix the *inter se* seniority between the writ petitioners and the fourth respondent before the learned Judge, in accordance with law. The order of Mudaliar, J. recites this fact as follows.-

> "During the hearing of the present batch of writ petitions, G.O.Ms.No.2336, dated 6.11.1972 was passed by the Government rendering G.O.Ms.No.2155, RD & LA dated 16.10.1964 retrospectively statutory and operative. In view of this change in the legal position occasioned by the issue of the above G.O. and also the latest position prevailing in the Panchayat Development Unit of Salem District, the Assistant Government Pleader stated that the concerned authority may be directed to fix the *inter se* seniority between the present writ petitioners and 4th respondent in accordance with law and it is accordingly directed to do so."

21. We may incidentally point out that this decision was rendered almost four years prior to the decision of Mohan, J. the decision of Mudaliar, J. was dated

10.1.1973, while the decision of Mohan, J. is dated 12.12.1977.

22. A careful reading of the decision of Mohan, J. would indicate that this decision was cited before him, but it appears that the learned judge was more influenced by the fact that "there was no rule which enabled the authority to place the respondents before him as seniors, merely because they were so in the lower cadre". This again, in our view, would be a very wrong assumption, because the very rules, dated 6.11.1972 cover the subject for which, according to the learned Judge there were no rules. This circumstance, in our view, is enough to show that the decision of Mohan, J. as well as that of the Division Bench cannot be considered as a binding decision, and the matter has to be considered afresh.

23. While referring to the exception to the rule of *stare decisis* it is observed in 'Precedent in English Law, by Rupert Cross, 1961 Edition, at page 130 as follows:

> "No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction), if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of *stare decisis* is probably best regarded as an aspect of a broader qualification of the rule, namely, that courts are not bound to follow decisions reached *per incuriam*."

The proposition that a decision *per incuriam* need not be followed as a binding precedent is well established. If authority is needed for the proposition, we may refer to the decision of the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*, (1944)2 All E.R.293 at 300 where Lord Greane, M.R. observed as follows:

> "Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute, the position is very different. It cannot in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*."

24. The Supreme Court in *Jaisri v. Rajdewan*, (1962)1 S.C.J.578= (1962)1 M.L.J. (S.C.) 258= (1962)1 An.W.R. (S.C.) 258= (1962)2 S.C.R.55= A.I.R.1962 S.C.83 has also quoted with approval the observations in Halsbury's Laws of England, Third Edition, Vol.22, paragraph 1687 pages 799-800, which are as follows:

> "The court is not bound to follow a decision of its own if given *per incuriam*. A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of a co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."

To the type of cases referred to in the passage from Halsbury's Laws of England cited above, must also be added decisions which are rendered without noticing the crucial and relevant statutory provisions of rules governing the relevant controversy.

25. After having given our anxious consideration to the question, we are of the view that we must consider the matter afresh. There are two Government Orders in this case; one is the impugned Government Order. G.O.Ms.No.783, dated 30.4.1981, and the other is G.O.Ms.No.862, dated 27.4.1968. We shall, for the moment, ignore these Government Orders and consider the real and true effect of the relevant rules. The relevant rules, which we have already quoted above are rule

35 (q) and 35(r). It will be advantageous at the outset to refer to the fact that, though the State Government had prescribed the examinations and tests by an administrative order, being G.O.Ms.No.2155 dated 16.10.1964, the examination was held for the first time only in November, 1965. Therefore by way of concession, the Government directed that the passing of departmental tests should not be insisted upon as a qualification for appointment of Managers till December, 1969. Now, with reference to the relevant date, namely, 16th October, 1964, so far as Managers are concerned, there were two categories of employees those who were appointed as Managers prior to 16.10.1964 and those who were appointed as Managers after 16.10.1964. The requirement of passing the departmental test came for the first time on 16.10.1964. The Government took the decision administratively in G.O.Ms.No.1678 dated 7.7.1966, that time should be given to those persons who were appointed as Managers or Accountants before 16.10.1964 to pass the departmental tests within the first four chances. Passing the departmental tests has become condition for appointment to the posts of Manager or Accountant with effect from 16.10.1964. Hence, in the case of those who were appointed after 16.10.1964, and were not able to comply with this condition by December, 1969, which was the date fixed by the State Government, the natural consequence was, they would be reverted. The Appointing Authorities seem to be in doubt as to the implementation of the Government's decision dated 27th April, 1968. This doubt, on record, is in the form of a query which was made by the Collector of Salem, to which a clarification was issued by the State Government in Memo dated 24.2.1970. The query made by the Collector was as follows:

> "Whether juniors appointed after 16.10.1964 will have to be reverted though they have since qualified now, and replace them by posting seniors though they have not yet passed the test in view of G.O.Ms.No.862, R.D. & L.A. dated 27.4.1968."

The Government gave the clarification to the effect that "according to the orders issued in G.O.Ms.No.862 R.D. & L.A. dated 27.4.1968 the promotions made after 16.10.1964 were purely temporary and the juniors appointed as Managers after 16.10.1964 will have to be reverted even though they (juniors) have qualified subsequently and they should be replaced by seniors though they have not yet passed the tests till December 1969. The test qualification shall be a pre-requisite for future appointment to the posts of Managers/Accountants viz. after December 1969."

26. Admittedly, the Government took an administrative decision with regard to the requirement of passing the department test. This administrative decision would hold the field only till such time as statutory rules under the proviso to Article 309 of the Constitution were made. Once statutory rules came to be made by the notification dated 28.8.1973 and it was expressly made retrospective with effect from 16.10.1964, the Government had deprived itself of its power to take any different administrative decision and hence, the rights of the concerned Government employees would have to be determined only on the basis of the relevant statutory rules. Therefore, in so far as appointments and promotions to the posts of Managers, Accountants and Assistants are concerned, if it is found that the matter is squarely dealt with by rules made under Article 309 of the Constitution of India, the first rights will have to be determined in accordance with those rules only. It is in this context that rule 35(q) and 35(r) become very relevant. If any action had been taken pending promulgation of the rules, such actions are bound to be only of a temporary character, except of course, in such cases in which a person had been confirmed in his post prior to 16.10.1964, when for the posts of Manager and Accountant, there were no statutory rules issued prescribing tests.

27. We shall therefore proceed to consider the scope of these rules. The

rules having been given effect retrospectively from 16.10.1964, the relevant date for the purpose of rule 35(q) will be 16.10.1964. Rule 35(q) says that.

"If any person holding the post of Manager or Accountant or Assistant in Panchayat Union Office, or the post of Accountant or Assistant in the Panchayat Development Branch of Collectorates and in Panchayat Development Section of Revenue Divisional Offices as on 16th October, 1964, fails to pass the departmental test and Panchayat Development Account Test within the first four chances, their increments shall be postponed without cumulative effect until they pass the said tests."

The language is plain and simple. The rule deals, as already stated, with persons who are holding the posts described therein as on the 16th of October 1964, which means that they have been appointed to the posts prior to 16th October, 1964, when there was no specification or requirement with regard to passing departmental tests. The rule says that, if such persons failed to pass the departmental tests within the first four chances, then their increments shall be postponed without cumulative effect until they passed the said tests. The rule therefore contemplated that the only action which can permissibly be taken in respect of those officers would be that they would not earn their increments as and when they became due, if they did not pass the necessary tests within the first four chances, and they would earn their increments only after they passed the tests. The rule says nothing about their reversion in contradistinction to the words of rule 35(r), which specifically refers to reversion. We shall refer to sub-rule (q) a little later. Reading sub-rule (r) it deals specifically with.

"Such of those persons who were appointed subsequent to 16th October, 1964, as Manager/Accountant/Assistant in Panchayat Union Offices, or as Accountant/Assistant in Panchayat Union Development Section in Revenue Divisional Offices and in Panchayat Development Branch in the Collectorates."

and says that, "if they do not pass the tests before 31st December, 1969, they shall be reverted." This sub-rule therefore clearly provides that such of those persons who are appointed after 16.10.1964 and have failed to pass the tests before 31st December, 1969, will have to be reverted. In other words, it is obligatory on their part to pass the tests before 31st December, 1969, if they wanted to continue to hold the posts to which they were appointed after 16.10.1964.

28. A small category of such persons who are covered by sub-rule (r) is carved out by the proviso which was added to this rule. This proviso, which we have reproduced earlier, refers to the employees selected from the Panchayat Union Service and appointed as Assistants, who have failed to pass the test before the 31st December, 1969 and the proviso expressly requires that such Assistants shall not be reverted to the Panchayat Union Service, if they were selected by the Screening Committee. It may be pointed out that rule 35(r) requires all persons, who were appointed to the posts specified therein after 16.10.1964 to pass the required tests before 31st December, 1969. A special treatment is given only to such Assistants and not to Managers or Accountants. The treatment is that, if the Screening Committee had selected the Assistants, then notwithstanding the fact that they have not passed the required tests before 31.12.1969, they will not be reverted, but they would only face the consequence of their increments being postponed without cumulative effect until they passed the tests. It has also to be remembered that the special rule 35 deals with the aspect of seniority. When provision is made by adding sub-rules (q) and (r) in a rule which substantively deals with seniority, the only logical conclusion which must follow is that the provision in sub-rules (q) and (r) of rule 35 were intended for the purpose of determination of seniority in a special way.

29. We may also at this stage refer to Rule 39 of General Rules which deals with temporary promotions. Rule 39 (a)(i) enables the State Government to promote a person from a lower category to a higher

category otherwise than in accordance with rules, which would mean that an unqualified persons can be promoted, subject, of course, to the requirement that such a promotion is necessary in public interest owing to an emergency which has arisen requiring the vacancy to be filed up immediately and that there was likely to be undue delay in making a promotion in accordance with rules. What is relevant for our purpose is general rule 39(a)(ii) which reads as follows:

> "No person who does not possess the qualifications, if any, prescribed for the said service, class or category, shall ordinarily be promoted under clause (i). Every person who does not possess such qualification and who has been or is promoted under clause (i) shall be replaced as soon as possible by promoting a person possessing such qualification."

Rule 39 (a)(ii) therefore contemplates that the promotion of any unqualified person to a post in the higher cadre must necessarily be by way of a temporary measure. Any promotion made by way of a permanent arrangement of a person who is not qualified will be clearly in breach of the relevant recruitment rules. The express provision made in rule 39(a)(ii) that "every person who has been temporarily promoted has to be replaced, as soon as possible, by promoting a person possessing such qualifications," is indicative of the fact and rightly so - that there should never be a regular promotion in any clear vacancy unless the person is qualified. Now if we read special rules 35(q) and 35(r) of Ministerial Service Rules in the light of general R.39 it is obvious that the provisions of Rule 35(q) and 35(r) were intended to prevent the consequences which would otherwise have followed, as a result of rule 39(a)(ii). Though for the first time test qualification for the posts of Managers and Accountants were introduced in 1964 with effect from 16.10.1964, so far as Assistants were concerned, only in G.O.Ms.No.2336, dated 6.11.1972, it was prescribed as a statutory rule. The position therefore clearly is that, unqualified persons promoted to the posts of Managers, Accountants or Assistants after 16.10.1964 had to be reverted back, because their promotions were temporary by virtue of general Rule 39(a)(ii), when as a result of special rule 35(q) all persons who were appointed as Managers or Accountants or Assistants prior to 16.10.1964 were relieved of the consequences of the effect of rule 39(a)(ii) the obvious intention was that their appointments were not treated to be of a temporary nature, but those appointments were given a finality. The fact that they have not been reverted and were entitled to continue in the respective posts would itself indicate that the appointments were treated as substantial appointment by the framing of Rule 35(q). Hence those persons who were appointed prior to 16.10.1964 would necessarily become seniors to all those who were appointed after 16.10.1964.

30. When we come to the appointments to those posts made after 16.10.1964 their respective placements would have to be determined in accordance with rule 35(r). No difficulty would be faced in the case of promotees after 16.10.1964. If they have failed to pass the necessary tests before 31.12.1969, and if they are not persons who fall under the proviso to rule 35(r), then they would all be reverted. The categories of persons dealt with under rule 35(r) would consist of two types: (i) those who had passed their examinations at different points of time, but prior to 31st December, 1969, and (ii) those who were selected by the Screening Committee and would be entitled to the benefit of the proviso to rule 35(r). Strictly speaking, the case before Mohan, J. was concerned with the first category of those employees, that is, those who had passed their examinations at different points of time, but before 31st December, 1969, all of them having been appointed after 16.10.1964. Some of the persons who were junior to those appointed earlier, but all of them appointed after 16.10.1964, had passed their examinations earlier. Now it is in that class of cases that is was directed that the passing of the qualifying tests would be determinative of seniority. Now one thing which has to be appreciated is that, when Rule 35(r) was framed, in so far as Assistants were concerned, the passing of examination before 31st

December, 1969, was only relevant for the purpose of further promotion. If juniors had passed their examinations earlier than the seniors, in the category of employees appointed between 16.10.1964 and 31.12.1969, the question is whether merely by virtue of having passed the examination they would become senior to persons who had not passed the tests, but who were appointed after 16.10.1964. All of these are persons who were not liable to be reverted at all, because they had passed the examinations prior to 31st December, 1969. As between themselves, they were allowed to continue to be Assistants up to 31st December, 1969, without having passed any examination. Once this position is accepted, that is, that in the absence of any express intention in Rule 35(r) that those who had passed the examination earlier would become senior to those who passed the examination later, it would be difficult to hold that rule 35(r) contemplated the passing of the examination as a criterion for determining seniortiy *inter se* between those who fall within rule 35(r). Mohan, J. seems to have taken the view that there is no rule to the contrary which enables those who have passed the examination later to be treated as seniors than those who have passed the examination earlier. With respect to the learned Judge, he seems to have lost sight of the fact that rule 35(r) treats alike different categories of persons, who were all permitted to continue in the posts and they have been given the facility of passing the examination up to 31st December, 1969. Once they satisfied that condition of passing the examination before 31st December, 1969, unless there is an express provision in the rule which, as between themselves, requires them to be treated differently for the purpose of promotion all those persons covered by rule 35(r) will have to be treated in the same manner. The same reasoning would apply to those who were entitled to the benefit of the proviso, because the effect of the proviso is that such persons cannot also be reverted. Their seniority will not become material, because for the purpose of further promotion, they will still have to pass the qualifying examinations, and their cases will have to be considered on the same footing as of those who have qualified after 31st December, 1969. Therefore, notwithstanding the fact that they will retain their placement in that post with reference to the date of their appointment, when it comes to their promotion and consideration of their chances of further promotion, they will have to be considered on the footing that they have passed the examinations after 31.12.1969, and, while doing so, their case will have to be considered only by reference to the dates on which they have qualified themselves and their seniority fixed on such dates.

31. We may therefore proceed on the basis that rule 35(r) positively permits the continuance of persons specified therein in their respective posts up to 31.12.1969 and they were not liable to be disturbed in their placement of seniority merely on account of the fact that some of the juniors have passed their examination earlier and some of the seniors have passed later.

32. In so far as junior Assistants are concerned sub-rules (q) and (r) do not apply to them at all, and their promotions will be dependent upon their qualifying for the post of Assistants. Rules 35(q) and 35 (r) are special rules and they must prevail over the general rules, in so far as preference to qualified persons in the matter of appointment is concerned. Once we appreciate the correct scope of sub-rules (q) and (r), then the principle which is applicable for determining seniority will be that seniority in cases covered by sub-rules (q) and (r) will be dependent upon their continuous length of service, and that will be the seniority which will have to be considered, when the question of promotion arises.

33. There are further sub-rules (s), (t), (u), (v) and (w) in rule 35 but those rules do not relate to seniority directly, but they provide for certain exemptions. Sub-rules (s) and (t) are not relevant for our purpose. They deal with certain tests which need not be passed by certain categories of persons.

34. Sub-rule (u) provides that nothing contained in the Special Rules will apply

to persons who held the posts of Managers/Accountants/Assistants in Block Development Offices or in the posts of Assistant/Accountant in the Offices of the Collectorate in Panchayat Development Branch or in Panchayat Development Section in Revenue Divisional Offices, on 16th October, 1964 or in the post of Superintendents/Assistants in the Administrative Branch of the Office of the Director of Rural Development on 12th January, 1970 so far as the posts which they held on those dates. This is a rule again by way of exception with which we are not concerned. Sub-rule (v) applies to the appointment to the posts of Assistant or Superintendent after 12th January, 1970 in the Office of the Director of Rural Development; and this rule provides that, if a person fails to pass the departmental tests and Panchayat Development Account Test within the first four chances commencing from the examination held in May, 1970 he shall be reverted. These rules are not relevant for our purpose. They will have to be taken into account in such of those instances wherein such concessions are applicable.

35. The working of these rules can best be illustrated by taking a few instances from the petitions which have been argued before us. In the writ appeal itself as we have already pointed out, the appellant Syed Mohideen was placed at serial No.25, because, though he had been appointed as Assistant on 2.10.1961, he passed the examination only in November, 1968. Now that placement is sought to be disturbed, because other persons who were appointed later to him as Assistants had passed the examinations much earlier and they were sought to be promoted. Irrespective of whether he passed the examination or not, he could not have been reverted, having regard to rule 35(q). Consequently any fresh appointees to the cadre of Assistants after 2.10.1961 must necessarily be placed lower in the list of seniority to the appellant Syed Mohideen.

36. Two Assistants, P.Krishnaraj and H.M.Ali Baig, are represented before us, having been ordered to be impleaded at their instance in the writ appeal. It will be advantageous to tabulate the dates of appointments with the number in the seniority list of 1974, and as now contemplated, as follows:

No. in the 1974 Seniority list	*Name*	*Date of Appointment*	*Date of passing the Examination*
25	Syed Mohideen	2.10.1961	November, 1968.
94	H.M.Ali Baig	19.10.1966	May, 1968.
122	P.Krishnaraj	26.8.1967	November, 1968.

37. Now the proposed seniority list as a result of impelmenting G.O.Ms.No.783 dated 30.4.1981 has resulted in Syed Mohideen going down from serial No.25 to 54 in the new list, H.M. Ali Baig going up from 94 to 48; and P.Krishnaraj going up from 122 to 17. If G.O.Ms.No.783 is implemented there is no doubt that this will be the result, because Krishnaraj has passed the examination as early as in November, 1966; H.M.Ali Baig has passed the examination in May, 1968 and Syed

Mohideen has passed the examination in November, 1968. However, having regard to the specific and special provision in Rule 35(1), Syed Mohideen being already an Assistant on 16.10.1964 and not liable to be reverted at all, his placement could not have been disturbed, notwithstanding the fact that he passed the examination only in November 1968. Syed Mohideen's passing the examination only in November, 1968, would become material for the limited purpose of considering as to when he should be treated as qualified for promotion to the higher post, if his name had to be considered under the normal rule. Undoubtedly P.Krishnaraj and H.M.Ali Baig were appointed after 16.10.1964, and prior to 31.12.1969. Between themselves, Baig is senior with reference to the date of appointment and Krishnaraj is junior. Both of them have passed the qualifying examination prior to 31.12.1969. There is therefore no question of any disturbance of their *inter se* seniority; Baig would always be senior to Krishnaraj in the category of Assistants, he having passed the examination prior to 31.12.1969.

38. In W.P.No.6403 of 1982, in which Mr.Chidambaram appears, the first eight of the petitioners were appointed as Managers in the Panchayat Union Offices on several dates between 8.9.1965 and 26.12.1969. As between themselves, they would fall under rule 35(r), and, if they have passed the examination before 31.12.1969, then they would be entitled to placement with reference to their date of appointment as contemplated by rule 35(r).

39. When we come to W.P.Nos.20, 21, 22, 23 and 24 of 1982 and 10995 and 10996 of 1982, which were argued by Mr.Sukantharaj, it appears that the petitioners have come up merely to quash G.O.Ms.No.783, which according to them, was going to affect them adversely. However, as rightly argued by the learned Government Pleader, on the basis of the dates of the appointment, it appears to us that would neither be covered by rule 35(q) nor by rule 35(r). These petitioners were undoubtedly appointed as Assistants on 16.11.1966, 22.8.1966, 7.6.1966, 20.8.1966 and 13.10.1968 respectively. If this fact alone is to be considered undoubtedly they belong to the category contemplated by rule 35 (r). But the second requirement of passing the examination before 31.12.1969 has not been satisfied in the case of these petitioners, because it is not disputed that they have passed the tests only after that date, namely, 9.11.1972, 16.11.1973, 8.11.1973, 6.5.1970, 14.5.1971 and 11.11.1971 respectively. Having regard to these dates, and it not having been shown that these persons fall within the proviso to rule 35(r), they were all liable to be reverted, and their seniority, if at all, in the cadre of Assistants, would have to depend upon when they are promoted subsequently by way of regular promotion after passing the necessary tests.

40. When we indicated to the learned Government Pleader that this was how Rules 35(q) and 35(r) should work the learned Government Pleader that those who fell under the two categories specified in Rules 35(q) and 35(r) were not entitled to have their seniority over those who were promoted on the basis of their qualifications. The learned Government pleader contended that the limited effect of rule 35(q) and 35(r) was that reversion was being prevented and that this was in the nature of a protection to employees who were already promoted. Apart from this, according to the learned Government Pleader, there was no other purpose in making rules 35(q) and 35(r). We have already indicated earlier that rule 35(q) was intended not merely for the purpose of avoiding the effect of rule 39(a)(ii), but the further consequence of that sub-rule was that the employees who fell within that sub-rule have acquired a right to continue in their respective posts, without earning increments, up to their date of superannuation, and they could be treated as validly holding the posts with reference to their respective dates of appointment. This would necessarily enure for their benefit in so far as the determination of their placement in the seniority list was concerned.

41. An argument was advanced before us, while attacking G.O.Ms.No.783, by Mr.Sukantharaj, that the said Government Order violated the statutory provisions

in regard to conditions of service in the General Rules Rr.19,27 and 36, and that the Government Order was being implemented without giving any opportunity to the petitioners to show why they should not be reverted. The first contention, in our view, has no substance. We have taken the view that Rr. 35(q) and 35(r) are Special Rules and Special Rules must prevail over General Rules. With regard to the contention that the Government Order was being implemented without giving an opportunity to the petitioners to show cause why they should not be reverted, it is obvious that the step which the State proposed to take after G.O.Ms.No.783 was issued was to make a provisional list in accordance with G.O.Ms.No.783 and invite objections. The provision for inviting objections would afford sufficient opportunity, though we have already indicated that, on facts placed before us, it does not appear that G.O.Ms.No.783 was of any consequence to the petitioners.

42. Mr.Desappan has referred us to the decision in *Vijayadevaraj v. G.V.Rao*, (1983)1 S.L.R.292= (1982)2 Karn.L.J.97= (1982)2 S.L.J.399. This is a decision of the Karnataka High Court in which it has been held that the term 'seniority' in public service is length of service in the very same grade or cadre. On principle there can be no dispute over this proposition.

43. Seniority is one of the important matters relating to the conditions of service, because it has a direct bearing on the question of promotion to the next higher grade. Where promotion to the next higher grade is based on the principles of seniority and merit, the seniority of an official becomes important, because where a senior official is suitable for promotion, he is entitled to get promotion on the basis of his seniority in preference to juniors. Even in cases where promotion is based on selection, seniority is also important, because where persons are selected to the next higher post on the basis of merit and suitability from among persons of equal merit, a senior is entitled to be preferred for appointment. See *Sant Ram Sharma v. State of Rajasthan*, (1968)1 S.C.J.672: (1968)1 S.C.R.111= A.I.R.1967 S.C.1910 at 1916.

44. The General principles in our view for fixing seniority are now well established. Seniority is always counted from amongst persons holding similar posts with similar status. Persons holding permanent or substantive posts are always treated as seniors to persons holding appointments on temporary or officiating posts. On this basis, those who were already covered by R.35(q) would be seniors to those appointed to their respective posts after 16.10.1964.

45. Mr.Desappan has also referred us to the decision of this Court in *Venkataraman v. Director of Postal Services*, (1970) 11 M.L.J.49. In that case the Division Bench was concerned with a Circular issued by the Post and Telegraph Department, which provided that in the matter of confirmation for the purpose of seniority of persons, who had passed the examination, whether officiating or not, it would be refixed in accordance with the date of their passing the examination. The Division Bench, while laying down the law, held that though it would be open to the authorities to fix the seniority before persons were promoted to the accountants grade on the date of their qualifying by the examination, once a number of people had been promoted and had begun to officiate in the higher grades all of them being qualified at the time of their promotion to officiate by having passed the examination, it would be discriminatory to ignore the seniority by the length of service and revert to the date of passing the qualifying examination for that purpose. The Division Bench took the view that to introduce a distinction in the matter of confirmation and seniority on the basis of the date of passing the examination would be introducing a totally irrelevant consideration for the purpose of confirmation. We respectfully agree with the view taken by the Division on Bench.

46. We need to consider separately only one contention which was advanced by Mr.Ramamurthy, who appears in W.P.No. 10617 of 1982. His contention that the judgment of Mohan, J. was not correct and was *per incuriam* has already been accepted by us. His second contention

is that the Government was competent to file an appeal, which was held to be incompetent by the Division Bench. This contention must be accepted. With great respect to the learned Judges of the Division Bench, it appears to us difficult to appreciate how, when a particular power of the State Government for making a seniority list has been struck down by the High Court, the State Government cannot be said to be an aggrieved party entitled to challenge the correctness of that decision before the appellate Court on the ground that the Government's policy decision was a right decision. The only forum where the State Government, whose policy decision has been struck down by a single Judge can challenge that decision is the Division Bench where the State Government must come by way of appeal. The State Government was expressly made a party to the writ petition, and apart from two other officers of the State Government, who were respondents 1 and 2, the State Government was respondent No.3. The case of the State Government was that the list that was prepared in accordance with G.O.Ms.No.862, the principles of which later on were incorporated in statutory rules, reflected the correct principle on which the seniority list would have to be framed. If this contention was rejected, the State Government was competent to canvass before the appeal Bench that under Rr.35(q) and 35(r) the State Government had laid down the correct principle, for the purpose of preparing the seniority list. We must therefore, respectfully differ from the view taken by the Division Bench that the State Government was not an aggrieved party. Undoubtedly, if the decision went against the respondents who were parties to the proceedings, they would be entitled to appeal, because, whether it was the right of the petitioners or the right of the respondents, how those rights have to be determined by the State Government is a matter of policy decision and the State Government is entitled to canvass that the view taken by it while laying down in the policy decision was correct.

47. Having regard to what we have stated earlier, the propositions which follow may be laid down:

(1) As a result of making R.35(q), any person who was already promoted to the post of Manager, Accountant, or Assistant in the Panchayat Union Offices or the Post of Accountant or Assistant in the Panchayat Development Branch of Collectorates and the Panchayat Development Section of Revenue. Division Offices as on 16.10.1964 could not be reverted, notwithstanding the fact that he had failed to pass the qualifying tests.

(2) The consequences of such failure to pass the qualifying test was simply that his increments are postponed without cumulative effect until he passed the said tests. His further promotions and seniority would be dependent upon passing the tests.

(3) All those persons who were appointed subsequent to 16.10.1964 to the posts mentioned above, were given the facility of passing the examination before 31.12.1969 failing which they would all be reverted.

(4) Only such persons who were selected from the Panchayat Union Service by the Screening Committee and appointed as Assistants would not be reverted to the Panchayat Union Service, but their increments would be postponed without cumulative effect, until they passed the tests. Their further promotions and seniority therein would be dependent upon the passing of the tests.

(5) In the category of employees who fell within R.35(q), their seniority would be determined with reference to their date of appointment.

(6) In the category of persons referred to in R.35 (r) and who were promoted before 31.12.1969, including persons who had the benefit of the proviso to that rule, their seniority would be determined *inter se* with reference to the respective dates of their appointment.

(7) Persons who were promoted to the posts mentioned in R.35(r) after 31st December, 1969 would be junior to the persons who were already covered by R.35(r), and their seniority *inter se* would be determined with reference to the respective

51. W.P.Nos.6401 of 1981, 10427, 10497 and 10548 of 1982, 1653, 3892 and 5320 of 1983 which have been filed by the respective petitioners for the issue of a writ of mandamus directing the Government to implement G.O.Ms.No.783 dated 30.4.1981 must stand rejected in the view we have taken.

52. Since G.O.Ms.No.783 dated 30.4.1981 has been quashed by us, the consequence is that any list made on the basis of that Government Order will also automatically become ineffective. The appointing authorities are now directed to make fresh lists of seniority in the respective cadres in the light of the above decision.

53. There will be no order as to costs.

R.S. --- *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.2441 of 1984.
8*th January,* 1985.

Sundaram *Petitioner**

v.

Jothi Bai *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10(3)(a)(i) - "Occupation" - Does not connote mere possession.

A careful consideration of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act clearly points out that there is a recognition even thereunder of a well-marked distinction between 'occupation' and 'possession'. "Occupation" means the act of occupying and connotes either actual presence in the building with an intention to do so and would comprehend a case where with such an intention, the building is made ready or kept in readiness for such use with all the essential requirements either for residence or for carrying on business, as the case may be as manifested at least by some overt act in that behalf. In other words, occupation of a premises undoubtedly would include possession of it though mere possession of it alone may not be sufficient to constitute 'occupation'. *[Para.7]*

C.S.Pillai v. Capt. M.A.Murugaraj, (1983)2 M.L.J.310, dissented from.

Cases referred to:-

Accommodation Controller v. G.Rukmani Ammal, A.I.R.1971 Mad.342: 84 L.W.90; *R.M.Kuppu Sah v. Rajaram Sah*, (1979) 92 L.W.165; *C.S.Pillai v. Captain M.A.Murugaraj*, (1983)2 M.L.J.310; *Bimla Devi v. First Addl. Dist. Judge*, (1984)1 R.C.J.489: (1984) All.W.C.603: (1984) 2 All.Rent Case.1: (1984) 10 All.L.R. 457: (1984)2 S.C.C.582= A.I.R.1984 S.C.1376; *Lanford Property Company Limited v. Athanassoglu*, (1948)2 All E. R.722; *Dr.Mohammed Ibrahim v. Ahmed Khan*, (1950)1 M.L.J.552: 63 L.W.410= A.I.R.180 Mad.556; *Firm Ram Kishnu Shah v. Jamuna Prasad*, A.I.R.1951 Patna 469; *Cantonment Board v. Dipak Parkash*, (1963)1 S.C.R.196: A.I.R.1963 S.C.963; *R.P.Mehta v. I.A.Sheth*, (1965)2 S.C.J. 608: (1964)8 S.C.R.1: A.I.R.1964 S.C. 1676; *Bega Begam v. Abdul Ahad Khan*, (1979)1 S.C.C.273: (1979)2 S.C.R.1: A.I.R.1979 S.C.272; *Babu Singh v. Rajkumari Jain*, (1982)1 S.C.J.229: (1982)1 S.C.C.520: A.I.R.1982 S.C.810; *Mrs. Gori Devi v. Shama Rao*, (1983)2 M.L.J. 223: 96 L.W.516: (1983)2 R.C.J.557; *The Queen v. St.Pancras Assessment Committee*, (1877)2 Q.B.D.581; *In re Garland, Eve v. Garland*, (1934) Ch.620: 103 L.J.Ch.287; *The King v. Ditcheat*, (1982) 9B and C.176: 109 E.R.66; *Martin Estates Company Ltd. v. Watt and Hunter*, (1925) N.Ir.79; *Rex v. St.Pancras*, (1877)2 Q.B.D.581; *Krishnalal Ishwar Lal Desai v. Baj Vijker*, (1965)2 S.C.J. 608: (1964)8 S.C.R.1= A.I.R.1964 S.C. 1676.

K.Padmanabhan of Kurian, Arumugam and Joseph, for Petitioner.

M. Raghavan for *T.V. Ramanujam*, for Respondent.

The Court made the following

ORDER:- The tenant, against whom the Appellate Authority has passed an order for eviction, on the application, of the landlady, the respondent herein, under Sections 10(2)(i) and 10(3)(a)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960, as amended by Act 23 of 1973 (hereinafter referred to as 'the Act'), is the petitioner herein.

2. The respondent is the owner of the premises bearing No.14, Old Slaughter House Street, Choolai, Madras-600 007, and the petitioner herein is a tenant therein on a monthly rent of Rs.30, the tenancy being reckoned according to the English calendar month. According to the case of the respondent, she is living in a rented premises and *bona fide* requires the house in the occupation of the petitioner for her own use and occupation. It was the further case of the respondent that three other tenants, who were in occupation of different portions of the premises, had already vacated realising the *bona fides* of the requirement of the respondent and though the petitioner was approached by the respondent with a request that the petitioner should deliver vacant possession, the petitioner merely promised to do so as soon as he was able to secure suitable accommodation, but did not vacate as promised, for more than a year, with the result that the other portions which had fallen vacant had also been kept vacant, as till such time the petitioner vacates from the building in his occupation, the entire building cannot be occupied by the respondent for her use. Stating that she was not occupying any residential building of her own in Madras City and that she required the premises in the occupation of the petitioner for her own use and occupation and further charging the petitioner with having committed wilful default in payment of rents for the months of June and July, 1982, the respondent filed R.C.O.P.No.4025 of 1982, praying for an order of eviction against the petitioner.

3. In his counter, while admitting the tenancy in his favour as well as its terms, the petitioner denied that the respondent was residing in a rented premises. The petitioner put forth the plea that though three other tenants had already vacated, the respondent had not occupied those portions, but had left the same idle without use and that established that the respondent was only anxious about evicting the petitioner with a view to let out the premises to others and, therefore, her requirement is not *bona fide*. Referring to the wilful default in the payment of rents attributed to the petitioner, he stated that the rent for the month of July, 1982 was paid on 8th August, 1982, and received by the husband of the respondent, who then warned the petitioner that he should vacate by the end of September, 1982 and that a similar warning was also given a week hence and this necessitated the writing of a letter by the petitioner on 11th August, 1982, to the effect that if the husband of the respondent did not turn up on or before 15th September, 1982, for collecting the rent for August, 1982, he would be obliged to send the rent for that month by money-order. Despite this, according to the petitioner, the husband of the respondent did not turn up to collect the rent and in accordance with the letter, the rent for August, 1982 was sent by money-order on 16th September, 1982, which, however, was refused by the respondent. Thus, according to the petitioner the rents upto July, 1982 had been paid by him and he also expressed his readiness and willingness to tender the rents for August and September, 1982 and stated there was no default, much less wilful default in the payment of rents for the period mentioned in the application for eviction.

4. Before the Rent Controller (VIII Judge, Court of Small Causes), Madras, Exs.P-1 to P-7 were marked on behalf of the respondent and her husband was examined as P.W.1 while, the petitioner examined himself as R.W.1 besides exhibiting Exs.R-1 and R-2. The learned Rent Controller, on a consideration of the oral as well as the documentary evidence, found

that there was no reason for accepting the evidence of P.W.1 and rejecting the testimony of R.W.1 and concluded that because P.W.1 did not go to receive the rent for August, 1982 in accordance with the notice issued by the petitioner, the rent had been sent by money order on 16th September, 1982 and, therefore, the petitioner has not committed wilful default in the payment of rents. Dealing with the requirement of the respondent for her own use and occupation, the learned Rent Controller held that the respondent was not owning any other building in the city of Madras, that having regard to the size of her family, the portions, which had already fallen vacant, would be sufficient to accommodate her and the members of her family and that the respondent was anxious to secure an order for eviction against the petitioner with a view to get higher rent for the portion in his occupation and, therefore, the requirement of the respondent is not *bona fide*. On those conclusions, the application for eviction filed by the respondent herein was dismissed. Aggrieved by that, the respondent herein preferred an appeal in R.C.A.No.1439 of 1983 to the Appellate Authority (IV Judge, Court of Small Causes), Madras. On a reconsideration of the evidence, the Appellate Authority found that the petitioner had not established payment of rents for the months of June and July, 1982 and that the non-payment of rent was wilful as well. Dealing with the requirement of the respondent for her own use and occupation, the Appellate Authority found that the respondent did not occupy a residential building of her own in the city of Madras and that though three portions had fallen vacant, they had been kept vacant under lock and key, as those portions were not sufficient and the respondent required the entire house for her own use and occupation after certain repairs and alterations and, therefore, that would not in any manner detract from the *bona fides* of the requirements of the respondent. It was further pointed out by the Appellate Authority that the sufficiency or otherwise of the accommodation and the size of the family of the respondent were all matters not relevant for consideration of the *bona fides* of the requirement and finally, the Appellate Authority pronounced in favour of the *bona fide* requirement of the respondent for her own use and occupation. On those conclusions, the dismissal of the application for eviction by the Rent Controller was set aside and an order for eviction was passed against the petitioner. It is the correctness of this order that is challenged in this Civil Revision Petition.

5. The learned Counsel for the petitioner first contended that even according to the Appellate Authority, three other portions in the same premises had fallen vacant and had been kept under lock and key by the respondent and that would amount to occupation by the respondent of a residential building of her own disentitling her from praying for an order of eviction against the petitioner under section 10(3)(a)(i) of the Act. Reliance in this connection was placed on the decisions in *Accommodation Controller v. G.Rukmani Ammal*, A.I.R.1971 Madras 342= 84 L.W.90, *R.M.Kuppu Sah v. Rajaram Sah*, (1979) 92 L.W.165, *C.S.Pillai v. Captain M.A. Murugaraj*, (1983)2 M.L.J.310 and *Bimla Devi v. 1st Additional District Judge*, (1984)1 R.C.J.489= (1984) All.W.C.603= (1984)2 All.Rent.Case.1= (1984) 10 All.L.R. 457= A.I.R.1984 S.C.1376= (1984)2 S.C.C. 582. On the other hand, the learned Counsel for the respondent Mr.M.Raghvan submitted, drawing attention to some of the provisions of the Act, that there is an inbuilt but well marked distinction between 'occupation' of the premises and mere holding of or control over the premises and that occupation would be a matter of intention manifested or disclosed by actual user or an overt act of user in one or more methods with reference to the premises in question. Indeed, the learned Counsel for the respondent even argued that physical occupation of the residential premises and the user thereof alone amounts to occupation as contemplated under section 10(3)(a)(i) of the Act. Support for this contention was sought to be drawn from the decisions in *Langford Property Company Limited v. Athanassoglu*, (1948)2 All E.R.722, *Dr.Mohammed Ibrahim v. Ahmed Khan*, (1950)1 M.L.J.552= A.I.R. 1950 Madras 556= 63 L.W.410, *Firm Ram Kishnu Shah v. Jamuna Prasad*, A.I.R.1951 Patna 469, *Cantonment Board v. Dipak*

Prakash, (1963)1 S.C.R.196= A.I.R.1963 S.C.963, *R.P.Mehta v. I.A.Sheth*, (1965)2 S.C.J.608= (1964)8 S.C.R.1= A.I.R.1964 S.C.1676, *Accommodation Controller v. Rukmani Ammal*, A.I.R.1971 Madras 342= 84 L.W.90, *Bega Begum v. Abdul Ahad Khan*, (1979)1 S.C.C.273= (1979)2 S.C.R.1= A.I.R.1979 S.C.272, *Babu Singh v. Rajkumari Jain*, (1982)1 S.C.J.229= (1982)1 S.C.C.520= A.I.R.1982 S.C.810, *Mrs.Gori Devi v. Shama Rao*, (1983)2 M.L.J.223= 96 L.W.510= (1983)2 R.C.J.557 and *Bimla Devi v. 1st Additional District Judge*, (1984)1 R.C.J.489= A.I.R.1984 S.C.1376= (1984)2 S.C.C.582.

6. There is no dispute that three portions which had been under the occupation of tenants had since fallen vacant. There is also no dispute that the respondent is living in a rented premises and that she does not own any other building except door No.57, Mannappa Mudali Street, Korukkpupet, Madras-21, a portion of which is in the occupation of the petitioner. Even as per paragraph 8 of the counter of the petitioner, the respondent had not occupied the portions which so fell vacant. The husband of the respondent, examined as P.W.1, in the course of his evidence, has stated that the portions which had fallen vacant already are insufficient and that the portion in the occupation of the petitioner is also necessary and that was the reason why the portions which had fallen vacant already were not occupied. Even the petitioner, in the course of his chief examination as R.W.1, has stated that the respondent did not occupy the vacant portions and that she is not in occupation of those premises. It is thus made out from the evidence of P.W.1 as well as R.W.1 that there is no physical occupation of the premises which had fallen vacant, by the respondent. Nevertheless, it is stated on behalf of the petitioner that inasmuch as the respondent had been able to secure vacant possession of three portions, she should be considered to be in occupation, within the meaning of Section 10(3)(a)(i) of the Act and would, therefore, be disentitled to seek an order for eviction against the petitioner. In other words, the petitioner desires the court to interpret the word "occupying" occurring in section 10(3)(a)(i) of the Act as equivalent to mere holding or connoting mere "possession".

7. It is necessary at this stage to briefly examine the provisions of the Act with a view to ascertain whether a distinction has been maintained between "occupying" and "possession" in the Act. Section 3 of the Act makes provision for giving notice of vacancy by the landlord as well as the tenant. A vacancy in respect of a building may arise either by the landlord or the tenant ceasing to remain or reside in the premises. Section 3 contemplates the arising of a vacancy by ceaser of occupation. In other words when there is no occupation, there is a vacancy. Explanation I to section 3 of the Act, on the other hand, provides for a case where a landlord obtains possession of a residential building or a non-residentail building under Section 10(3) of the Act and lets out the whole or part of it to a tenant or allows the whole or part of it to be occupied by any person, and he is also deemed to have failed to give notice. *Explanation* II provides for the case of a purchaser not obtaining vacant possession, but allowing the seller to occupy the whole or part of the building and even in such a case, the buyer is deemed to have failed to give notice. Section 3(2) of the Act provides that in the city of Madras or Madurai or other Municipality to which that sub-section would apply, if a tenant of a building puts another in occupation and does not re-occupy within a period of three months, then, on the expiry of that period, the tenancy shall be deemed to have been terminated and in that situation, it is the duty of the tenant as well as the landlord if he is aware of such termination, to give notice of such termination. Under section 3(5) of the Act, after receipt of notice of vacancy, if the Government requires the building for the purposes of the State or Central Government or of any local authority or public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall deliver possession to the authorised officer. The first proviso to section 3(5) of the Act states that if the landlord fails to deliver possession of the building

to the authorized officer within forty-eight hours of the receipt of the intimation that the building is required for any of the aforesaid purposes or for occupation by any of the officers specified in section 3(3), the Government shall be deemed to be the tenant from the date on which delivery of possession is given. The fifth proviso to section 3(5) of the Act is to the effect that on the delivery of possession of the building, the allottee shall pay rent to the landlord proportionately for any part of the calendar month of his occupation. Section 3(9)(a)(i) of the Act empowers the Government to summarily dispossess any landlord or tenant or other person occupying any building in contravention of the provisions of section 3 or any landlord who fails to deliver possession to the Government of any building in accordance with the provisions of sub-section (5) of section 3 and enables the Government to take possession of the building. Section 3-A of the Act provides for the release of a building in respect of which notice has been given on the ground that the building is required for the occupation of the landlord or for carrying on a business, depending upon whether it is a residential or non-residential building. Under section 3-A(5) of the Act, if after the release of a building, the landlord or any member of his family does not put the building to such use for which it was so released, but had let out or kept it vacant or put the building to a use other than that for which it was released, then the building shall be deemed to have become vacant from the date of expiry of the period of thirty days specified under sub-section (4) of section 3-A, within which the landlord should occupy the premises released. Section 10 of the Act, providing for several grounds upon which an order of eviction can be obtained, has included therein ceasing to occupy the building when it is not situated in hill-station for a continuous period of four months without reasonable cause. Under section 10(3)(a)(i) of the Act, the landlord is enabled to secure an order for eviction in respect of a residential building if the landlord requires it for his own occupation or for the occupation of any member of his family and if he or any member of his family is not occupying a residential building of his own. Section 10(3)(a)(ii) of the Act makes a special provision with reference to a non-residential building used for the purpose of keeping a vehicle or adopted for such use. The landlord, in such a case, in enabled to secure an order for eviction if he requires it for his own use and if he is not occupying any such building in the city, town or village concerned. In relation to non-residential buildings, under section 10(3)(a)(iii) of the Act, provision is made enabling the landlord to secure an order of eviction if he or any member of his family is not occupying for purposes of a business, which he or any member of his family is carrying on, a non-residential building in the city, town or village concerned. Section 10(5)(a) of the Act provides for restoration of the tenant to the premises from which he was evicted under certain circumstances. If, after having obtained possession pursuant to an order of eviction under section 10(3) or 10(3-A) of the Act, the landlord does not occupy the building himself within one month after obtaining vacant possession, or if having occupied vacates it without reasonable cause within six months, then the tenant can approach the Rent Controller for an order directing the restoration of possession of the building. Section 12 of the Act is made applicable to buildings in respect of which the Government shall be deemed to be a tenant and provides for recovery of possession by the landlord for repairs or for the demolition and reconstruction. In case of repair, the authorized officer is empowered to order delivery of possession of the building to the landlord subject to an undertaking that the building, on the completion of the repairs, he offered to the authorized officer before the expiry of three months from the date of recovery of possession by the landlord or such further period as may be allowed for re-allotment to any person. Similar provision is also made with reference to demolition and reconstruction of the buildings. Section 14 of the Act contains provisions for recovery of possession for repairs and demolition and reconstruction, similar to section 12 of the Act, but relating to tenants other than the Government. Under sections 15 and 16 of the Act,

provision is made to enable the tenant to re-occupy the building after repairs and if the building is not demolished. A careful consideration of the aforesaid provisions of the Act clearly points out that there is a recognition even thereunder of a well marked distinction between "occupation" and "possession". "Occupation" means the act of occupying and connotes either actual presence in the building with an intention to do so and would comprehend a c [illegible] with such an intention the building [illegible] ready or kept in readiness for such use [illegible] all the essential requirements either [illegible] residence or for carrying on business, [illegible] the case may be, or manifested at least by some overt act in that behalf. In other words, occupation of a premises undoubtedly would include possession of it, though mere possession of it alone may not be sufficient to constitute occupation.

8. Indeed, that there is such a distinction between "occupation" and "possession" or mere holding has been clearly pointed out, though it may not be always easy to give an accurate as well as an exhaustive enumneration of the two concepts. Lush, J. in *The Queen v. St. Pancras Assessment Committee*, (1877)2 Q.B.D.581 at 588, referring to this, has observed as under.

> "It is not easy to give an accurate and exhaustive definition of the word "occupier". Occupation includes possession as its primary element, but it also includes something more; legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not treatable for it is an occupier. If, however, he furnishes it, and keeps it read for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year."

In re *Garland, Eve v. Garland*, (1934) Ch.620: 103 L.J.Ch.287 a testator bequeathed to his wife any house of which be might at the time of his death be the owner and occupier, and when he died, his wife was in occupation of a house which he had bought where his furniture had been kept, but in which he never resided, as he had become of unsound mind after the purchase and had to be removed to a mental house. It was held that the testator was the occupier of the house at the time of his death and that under the terms of his will, his widow was, therefore, entitled to the proceeds of the sale of the house.

In *The King v. Ditcheat*, (1892) 9 B and C.176.109 E.R.66 Littledale, J. said.

> "There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another, he does not necessarily occupy. In order to occupy, party must be personally resident by himself or his family."

Moore, C.J. in an Irish case *Marum Estates Company Limited v. Watt and Hunter*, (1925) N.Ir.79 at page 85 has made the following observations, which are very relevant.

> "Occupation means that the owner is in actual physical enjoyment of the house, property or estate by himself, his agents or servants. Strictly speaking, occupation by the owner cannot include the case of sub-tenants for the actual occupation is in them. A limited form of occupation is 'residence' which involves the dwelling for some period of the year on the premises personally of the owner or his family or alternatively, at least, of his domestic servants."

In *Langford Property Company Limited v. Athanassoglou*, (1848)2 All E.R.722, the Court had to consider the entitlement to possession on the ground that the tenant was not in personal occupation of the premises so as to enable him to claim the benefits of the Rent Restrictions Act, but had sub-let it to another. Factually it was found that though the tenant was not in personal occupation of the premises, which contained his furniture, he slept there whenever he was required to do so for business purposes, which was on

an average twice a week and that was held to amount to personal occupation by the tenant. In *Dr. Mohammed Ibrahim v. Ahmad Khan*, (1950)1 M.L.J.552= A.I.R. 1950 Mad.556= 63 L.W.410, which arose under the provisions of section 7(3)(a)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act 15 of 1946, comparable to section 10(3)(a)(i) of the Act, the question arose whether a landlord can be said to be not occupying a residential building of his own when he owned two houses, one of which was vacant and in another his second wife was living while staying in a rented house with his first wife and sometimes used to stay in the house where the second wife was living. In dealing with this, the Division Bench pointed out after referring to the above mentioned decisions that a person must be deemed to be occupying a residential building at the time of an application for eviction if any of the members of his family including dependants, reside in the building with his permission and on his account, though physically he himself might not be residing therein and that the test is, whether if he desires, he cannot at any time go to reside in it. Taking note of the fact that the house in which the second wife was living was certainly a house to which the landlord could go and reside at any time he chose, it was held by the Division Bench that the landlord must be held to be occupying a residential house of his own. In doing so, the test formulated in he decisions referred to above was applied. This decision, though rendered with reference to the provisions of section 7(3)(a)(i) of the Act 15 of 1946, in my opinion, would squarely apply to this case In *Firm Ram Kishun Shah v. Jamuna Prasad*, A.I.R.1951 Pat.469 the word "occupation" occurring in section 11(3) of the Bihar Buildings (Lease, Rent and Eviction Control) Act, III of 1947 came up for consideration and the Court approved of the considerations pointed out in *Rex v. St. Pancras*, (1877)2 Q.B.D.581 at page 588. to ascertain whether there was occupation. The Supreme Court, in *Cantonment Board v. Dipak Prakash*, (1963)1 S.C.R.196= A.I.R.1963 S.C.963, pointed out, while considering the argument that the word "occupation" should ordinarily be interpreted as actual occupation, but that it is difficult to agree that when a person, entitled to actual occupation by reason of his lease permits another to occupy it, then it ceases to be in the actual occupation of the person so permitting. It was also further pointed out that even if the military officer in occupation was away for months together and the members of his family or his servants were residing, it would not make the building one which ceased to be in the occupation of the officer and, therefore, where a person entitled to occupy, permits another to occupy the same, he is in actual possession through such other person. This decision draws attention to the need for either actual occupation by the person entitled to occupy the same or by another person put in occupation by the person entitled to occupy the same. In either event, this decision appears to lay down that there should be actual occupation or constructive occupation, neither of which is present in this case with reference to the respondent herein in relation to the three portions which had fallen vacant. In *R.P.Mehta v. I.A. Sheth*, (1965)2 S.C.J.608= (1964)8 S.C.R.1= A.I.R.1964 S.C.1676 the expression "occupation" occurring in section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act 57 of 1947, came up for consideration before the Supreme Court. Referring to the earlier decision of the Supreme Court in Civil Appeal No.804 of 1962, dated 18th January, 1963 (*Krishnalal Ishwarlal Desai v. Bai Vijker*, (1965)2 S.C.J.608= (1964)8 S.C.R.1= A.I.R. 1964 S.C.1676 where the Supreme Court stated that when possession is obtained in execution, it must be followed by an act of occupation, which must inevitably consist of some overt act in that behalf, it was pointed out that occupation does not necessarily refer to occupation as residence, but such occupation can be by making use of it in any manner. On the evidence in this case, it is clearly established that the respondent is neither in physical occupation nor has she made use of those premises in any manner. Again, in *Bega Begum v. Abdul Ahad Khan*, (1979)1 S.C.C.273= (1979)2 S.C.R.1= A.I.R. 1979 S.C.272 the word "occupation" occurring in section 11(1)(h) of the Jammu and Kashmir Houses and Shops Rent

Control Act (34 of 1966), came to be interpreted by the Supreme Court in the context of the argument that the words "own occupation" postulated that the landlord must require for his personal residence. The Supreme Court pointed out that the section contemplates actual possession of the landlord, whether for his own residence or for his business and even if the landlord was running a hotel in the house, he would be undoubtedly in possession or occupation of the house in the legal sense of the term. This decision also reiterates that the expression "occupation" is wide enough to include actual possession of the landlord, whether for his own residence and also for persons living with him as members of the same family or for his business. Emphasis has been laid in this decision on the personal occupation by the landlord of the premises either for himself or for the occupation of any person for whose benefit the house or shop is held as provided under section 11(1)(h) of that Act. In considering the import of the word "possession" occurring in section 17(2) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), the Supreme Court in *Babu Singh v. Rajkumari Jain*, (1982)1 S.C.J.229= (1982)1 S.C.C.520= A.I.R.1982 S.C.810, observed that though the lady did not actually reside in the premises which were locked, but it contained her household effects, it cannot be said that she was not in possession of the premises so as to make section 17(2) of that Act inapplicable and that possession by a landlord of his property may assume various forms inclusive of by leaving it in charge of a servant or by putting his house-hold effects or things locked up in the premises and that such an occupation also would be full and complete possession in the eye of law. This decision also lays emphasis on the requirement that in order to constitute occupation which includes possession in law, it is unnecessary that the person occupying should actually reside in the locked up premises, but it would suffice if the premises had been left either in charge of the servant or within the premises, some house-hold effects or things of the landlord had been left behind. In this case, there is absolutely no evidence to show that the portions which had fallen vacant already had been left by the respondent in charge of some servants or that she had left inside those premises some articles and house-hold effects belonging to her. In *Mrs. Gori Devi v. Shama Rao*, (1983)11 M.L.J.223= (1983)2 R.C.J.557= 96 L.W.516, the maintainability of an application for eviction under section 10(3)(a)(i) of the Act came up for consideration and it was urged that as the second-floor had been kept under lock and key by the landlady that was under her occupation and that the proper remedy of the landlady would only be to file an application for eviction of the tenant under section 10(3)(c) of the Act and not under section 10(3)(a)(i) of the Act. Swamikkannu, J. pointed out that in the case of a residential building, "occupation" can only mean "living in it", and the fact some rooms in a house are kept locked by the landlady will not lead to the conclusion that she is in occupation of a part of the building, within the meaning of section 10(3)(c) of the Act, especially when it is beyond dispute that the landlady is living in a separate rented building with the other members of her family. However, in *C.S.Pillai v. Capt., M.A.Murugaraj*, (1983)2 M.L.J.310 while considering the identical question regarding the maintainability of the application for eviction under section 10(3)(a)(i) of the Act, it was held that if the landlord is in juridical or legal possession of the ground floor, that would be enough to non-suit him concerning the eviction of the tenant from the first-floor under section 10(3)(a)(i) of the Act and that the remedy of the landlord would be only to file an application under section 10(3)(c) of the Act and not under section 10(3)(a)(i) of the Act. To arrive at such a conclusion, reliance has been placed upon *Accommodation Controller v. G.Rukmani Ammal*, A.I.R.1971 Madras 342: 84 L.W.90. It is difficult to read this decision in the manner done, for all that has been laid down in that case is that to constitute occupation, it need not be physical in the sense that there should be actual residence in a portion of the house, but that it would suffice if, with the intention to reside, a portion of the premises is kept locked so that when the necessity arises that may be used. The emphasis is on the manifestation of an intention

to reside coupled with the retention of a portion in readiness for that purpose. Merely from the circumstance that a landlord is in juridical possession without more of the ground-floor, it would not *ipso facto* follow that he is in occupation thereof. If mere juridical possession would suffice to make it occupation for purposes of section 10 of the Act, some strange results may also follow. Juridical possession referred to may be either actual or constructive. If it is a case of actual possession, then it follows that the landlord should be physically in occupation. In such a case, occupation and possession go together. Or it should be shown that he had retained control and possession over the premises either by manifesting an intention to reside there by retaining a portion thereof and by leaving some of his articles there or even by employment of a servant to look after the premises. Shorn of this requirement, it is difficult to conceive of, in the light of the principles laid down by the decisions referred to above, other kinds of possession, for purposes of the provisions of the Act, which can be equated to "occupation" in law. Considering the position from the point of view of constructive possession, it is at once obvious that in every case where a building had been let out by a landlord, he is in possession of the same through his tenant and there could therefore, be no case of a landlord not occupying either a residential premises or non-residential premises of his own, with the result that no application for eviction can at all be filed. In addition, it is seen that the attention of the learned Judges does not appear to have been drawn to the decision of the Division Bench reported in *Dr.Mohammed Ibrahim v. Ahmed Khan*, A.I.R.1950 Mad.556 and the other decisions referred to earlier in this judgment. It, therefore, follows that the decision in *C.P.Pillai v. Capt., M.A.Murugaraj*, (1983) 2 M.L.J.310 relied on by the learned Counsel for the petitioner rendered without reference to the Bench decision and others cannot be applied to this case.

9. In *Bimla Devi v. 1st Additional District Judge*, (1984)1 R.C.J.489= A.I.R.1984 S.C.1376= (1984)2 S.C.C.582, the Supreme Court had to consider whether the keeping of household effects in a part of the premises of the landlord, while he was residing elsewhere, would be sufficient to hold that he was in occupation of the premises. Referring to *Babu Singh Chauhan v. Rajkumari Jain*, (1982)1 S.C.J.229= (1982)1 S.C.C.520= A.I.R.1982 S.C.810= (1982)3 S.C.R.114, it was pointed out that in that decision the word "possession" had been treated as synonym of the word "occupation" occurring in Explanation (iv) to section 21(1)(b) of the Uttar Pradesh Buildings (Regulation of Letting, Rent and Eviction) Act 13 of 1972 and that if control over the entire or a portion of the property is retained either by making casual visits or by even locking up the premises keeping the household effects therein, that would be occupation of the premises. As pointed out earlier, on the facts and the evidence in this case, no sort of control in any manner had been exercised by the respondent over the portions which had already fallen vacant and applying the ratio of this decision of the Supreme Court, the respondent cannot be stated to be in occupation of the vacant portions. *Accommodation Controller v. G.Rukmani Ammal*, A.I.R.1971 Mad.342= 84 L.W.90, has already been referred to. As pointed out earlier, that decision merely laid down that for the purpose of section 3(10)(c) of the Act, it would suffice if the owner resides in a portion of the house off and on but keeping it locked most of the time, and it is a question of intention disclosed by acts of user. Even applying this test to the facts of this case, as seen already, the respondent is not admittedly residing in a portion which had fallen vacant nor is there any manifestation of an intention by her for occupying it by acts of user. Therefore, that decision clearly does (sic) not advance the case of the petitioner. *P.M.Kuppu Sah v. Rajaram Sah*, (1979) 92 L.W.165 does not also assist the petitioner in any manner, for, it was found on facts, that the landlord had kept his things in a portion of the premises and had also kept it locked and under his control and under those circumstance it was held that it was the intention of the landlord to keep the premises in his physical possession, which is totally absent in this case. *Bimla Devi v. 1st Additional*

District Judge, (1984)1 R.C.J.489= A.I.R. 1984 S.C.1376= (1984)2 S.C.C.582, far from supporting the petitioner, assists, the stand taken by the respondent. The Supreme Court has, after referring to the earlier decision in *Babu Singh Chauhan v. Rajkumari Jain*, (1982)1 S.C.J.229= (1982)1 S.C.C.520= A.I.R.1982 S.C.810= (1982)3 S.C.R.114 and the dictionary meaning of the word "occupation" drew attention to the circumstances of retention of control over the entire or a portion of the property and the locking up of the premises with the household effects inside as establishing occupation. The evidence in this case does not make out either the retention of control over the entire or a portion of the property with a view to live therein either by locking up the household effects or even by putting a servant or an agent in charge of the vacant premises. Thus, on a careful consideration of the facts and the evidence in the light of principles laid down in the decisions referred to above, the conclusion is irresistible that the respondent is not in occupation of the portions which had already fallen vacant and can, therefore, maintain the application under section 10(3)(a)(i) of the Act.

10. P.W.1, in the course of his evidence, has stated that the portions that had already fallen vacant are not sufficient for the occupation by the respondent and himself and a foster daughter. In the course of his cross-examination, he had denied the suggestion that the vacant portions would be sufficient and had further stated that only because the accommodation was not sufficient, he did not occupy the same. R.W.1 has also in a manner admitted the insufficiency of the already available accommodation, for, he stated that it is not correct to say that the respondent does not require the premises in his occupation. Therefore, apart from the fact that the respondent is not occupying the portions which have fallen vacant already, there is also an acceptable explanation for non-occupation of the vacant portions. The evidence discloses that the family of the respondent consists of P.W.1, the respondent and a foster-daughter. There is nothing in the evidence to indicate as to how much accommodation was made available for occupation by the respondent and the other members of her family by the vacant portions and, therefore, it cannot be assumed that the vacant portions would be sufficient. On the contrary, the evidence of P.W.1 is to the effect that the available accommodation is insufficient and that has not in any manner been established to be unacceptable. There is one other circumstance which would also clinchingly establish that the available accommodation must be insufficient to meet the needs of the respondent and the other members of her family. The evidence discloses that three portions fell vacant some time in June, 1982 and the undisputed fact is that the respondent has not occupied those portions until this day and that would indicate that unless the portion in the occupation of the petitioner is also made available, the respondent cannot move in and live comfortably in the entire building fulfilling the needs and requirements of the respondent and the members of her family. There is also an indication that repairs have to be carried out to all the portions before occupation by the respondent, as seen from Ex.P-4. Further, the evidence clearly shows that the respondent does not own any other building. Ex.P-1 series, which are the receipts for the payment of rents by P.W.1, show that the respondent and her husband were living as tenants in a portion of the first floor of door No.57. Mannappa Mudali Street, Madras-21, on a monthly rental of Rs.110 till about January, 1983. Subsequently, the respondent and her husband have shifted to another premises in Mahakavi Bharathi Nagar, Madras-39. This is established by Ex.P-2, which is a receipt for two months' advance issued by the landlord of that premises. Inasmuch as the respondent is living in a tenanted premises and does not own her own building, she would be entitled to seek an order for eviction against the petitioner on the ground that she *bona fide* requires the same for her own use and occupation. The evidence does not in any manner disclose lack of *bona fides* on the part of the respondent. On the contrary, the very circumstance that since June, 1982 the respondent had not occupied the portions which had fallen vacant, would strongly make out the *bona fides* of her

claim for personal occupation as ordinarily no person is likely to keep the available accommodation vacant for long losing the substantial rental income therefrom. There is also no suggestion that the application for eviction was in any manner motivated. Besides, the petitioner as R.W.1 has admitted that he told P.W.1 that he will vacate when he secures another place and this could be only on the footing that even the petitioner was convinced about the *bona fides* of the requirement of the respondent. Taking into account the aforesaid aspects, it has to be held that the Appellate Authority was right in its conclusion that the respondent has established her *bona fide* requirement of the premises in the occupation of the petitioner for her own personal use and occupation.

11. The learned Counsel for the petitioner next contended that the Appellate Authority was in error in concluding that the petitioner had committed wilful default in the payment of rents for the months of June and July, 1982. On the other hand the learned Counsel for the respondent would submit that on the evidence of P.W.1, clearly a case of wilful default has been established against the petitioner justifying the passing of an order for eviction against him. There is no dispute about the monthly rent. According to the case of the petitioner, the practice was for P.W.1 to come and collect the rents. The application for eviction was on the basis of wilful default in the payment of rents for the months of June and July, 1982. With reference to the payment of rent for June, 1982 the petitioner has not specifically pleaded that it was paid, though in evidence he attempted to say that it was paid some time in the first week of July, 1982. While the petitioner as R.W.1 stated that no receipts were given by P.W.1 for the payment of rents to him. P.W.1 stated that the petitioner used to write out receipts and obtain his signature. No receipts at all had been produced for the payment of rents. No acknowledgement signed by the petitioner has also been produced by the respondent for having passed receipts in the manner spoken to by him. It, therefore, appears that there was no practice of issuing receipts at all for the payment of rents made. Regarding the wilful default in the payment of rents for the months of June and July, 1982, the evidence is the oral testimony of P.W.1. As against that, the evidence of R.W.1 would show that he had paid the rents for the months in question. R.W.1 has stated that for the month of June, 1982, the rent was paid to P.W.1 on the 7th or 8th July, 1982. Similarly, he has stated that the rent for the month of July, 1982 was paid on 8th August, 1982. R.W.1 would also admit that he is not in the habit of maintaining accounts. On a careful consideration of the testimony of P.W.1 and R.W.1, it is seen that the version of the husband of the respondent as P.W.1 appears to be more probable rather than that of R.W.1, Ex.P-4 is the copy of the notice, dated 4th August, 1982, and that shows that the respondent had issued a notice to the petitioner setting out her *bona fide* requirement of the portion in the occupation of the petitioner for her own use and occupation and also mentioning the commission of wilful default by the petitioner in the payment of rents for the months of June and July, 1982. The notice sent is Ex.P-3, and it has been addressed to the petitioner to his correct address. The petitioner would also admit that among the tenants in occupation, he was the only one of the name of Sundaram. It is seen that the notice Ex.P-3 has been returned by the petitioner on the ground that the rent for the month of July, 1982 had been paid by him on 8th August, 1982 and requesting the respondent and her husband to come and collect the rent for August, 1982 on or before 15th September, 1982, failing which, it was stated that the rent would be sent by money-order. It is at once obvious that getting scent of the despatch of the notice under Ex.P-3, the petitioner had manoeuvred to refuse the same, though he was the only person of the name mentioned in the envelope, which is admitted to be correct, and had further followed it up by issuing Ex.P-5, dated 11th September, 1982 making it appear as if the rent for July, 1982 had been paid and stating further that the rent for August, 1982 should be collected on or before 15th September, 1982. To this the respondent has sent a notice under Ex.P-6, dated

16th September, 1982. Therein, the refusal of the notice sent under Ex.P-3 by the petitioner has been referred to and the non-payment of the rent by the petitioner from June, 1982 has also been reiterated. The respondent has also expressed the readiness and willingness to receive the rents from June, 1982 onwards. To this, the petitioner sent a reply under Ex.P-7, dated 27th September, 1982 reiterating the payment of rent for the month of July, 1982 on 8th August, 1982. While the notices issued by the respondent under Ex.P-3 (Ex.P-4 copy) and Ex.P-6 clearly refer to the non-payment of rents for June and July, 1982, the petitioner, either in Ex.P-5 or in Ex.P-7, has not said anything with reference to the non-payment of the rent for June, 1982. There is no whisper either in Ex.P-5, or in Ex.P-7, that the rent of June, 1982 had been paid. Under those circumstances, the evidence of R.W.1 to the effect that the rent for June, 1982 was paid on the 7th or 8th of July, 1982 is rather difficult to accept. Besides, the petitioner has not satisfactorily established that the rent for the month of July, 1982 had also been paid in the manner stated by him. The Appellate Authority, on a consideration of the testimony of P.W.1 and R.W.1, was inclined to accept the version of P.W.1 to that of R.W.1. The non-payment of the rents by the petitioner for the months of June and July, 1982 had been referred to by the respondent at the earliest point of time when the notice was issued under Ex.P-3 (Ex.P-4 copy). That was also reiterated in Ex.P-6. Apart from the assertion in Ex.P-5 that the rent for July, 1982 had been paid on 8th August, 1982 the petitioner has not in any manner substantiated the same. It is significant that in Ex.P-7, which was the reply to Ex.P-6 issued by the respondent, the petitioner has not stated that the rent for June, 1982 had been paid. The payment of rent for July, 1982 in person to P.W.1 alone has been referred to. From the available materials, it is clearly established that the petitioner had without doubt, committed default in the payment of rent at least for June, 1982. Regarding the non-payment of rent by the petitioner for the month of July, 1982 no clinching material has been placed by the respondent that the petitioner did commit default in the payment of rent for that month. Therefore, the conclusion of the Appellate Authority that the petitioner had committed wilful default in the payment of rent has to be maintained, though such default is only for the month of June, 1982.

12. Thus, on a careful consideration of the facts, evidence and the other circumstances, it is clearly established that the respondent has made out her *bona fide* requirement of the premises in the occupation of the petitioner for her own use and occupation and that the petitioner had also committed wilful default in the payment of rent. Under those circumstances, no exception could be taken to the order of eviction passed by the Appellate Authority. Consequently, the Civil Revision Petition fails and it is dismissed with costs.

B.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswamy and K.Shanmukham, JJ.*

*L.P.A.Nos.77 and 98 of 1978.

17th December, 1984.

Andalammal *Appellant**

v.

Rajeswari Vedachalam and others *Respondents.*

Contract Act (9 of 1872), section 16(1) and (3) - Difference between - Pointed out.

A close examination of section 16 of the Contract Act reveals that under circumstances set out in section 16(1), a case of undue influence is established. If the circumstances set out either in sub-clause (a) or sub-clause (b) in sub-section (2) are found to be established, a person is deemed to be in a position to dominate the will of another. Sub-section (2) is common to sub-section (1) and sub-section (3) of section 16. As between sub-section (1) and sub-section (3), the common factor is that one of the parties was in a position to dominate the will of the other. Sub-section (1) and sub-section (3) cover two different fields, though, at times, one may overlap the other. To attract sub-section (1) two things should be established, namely, (a) one of the parties was in a position to dominate the will of the other and (b) used that position and obtained an unfair advantage over the other; while to attract sub-section (3) (a), the person was in a position to dominate the will of the other, and (b) the transaction appeared on the face of it or on the evidence adduced to be un-conscionable. There is another vital difference between sub-section (1) and sub-section (3). In sub-section (3), if the two ingredients are established, the burden of proof that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. This presumption is absent in sub-section (1). Another special feature is found in section 16(3); if it is established that a person who is in a position to dominate the will of another entered into a contract with him and if the transaction appeared either on the face of it or on the evidence adduced to be unconscionable, the burden is upon the person who was dominating the will of another to prove that such contract was not induced by undue influence. The word 'shall' found in section 16(3) indicates that the presumption is mandatory. To put it differently, positive proof that the transaction is unconscionable is dispensed with to raise a statutory presumption and the statutory presumption would be in force until the burden is rebutted. *[Para.21]*

Cases referred to:-

Asho Devi v. Dukhi Sao, (1975)1 S.C.J. 174= (1975)1 S.C.R.611= (1974)2 S.C.C. 492= A.I.R.1974 S.C.2048; *Gopal Krishnaji v. Mohd. Haji Latif*, (1968)2 S.C. J.934= (1968)3 S.C.R.862= A.I.R.1968 S.C.1413; *Atta Md. v. Emperor*, L.R. (1930) 57 I.A.71= 58 M.L.J.363= A.I.R. 1930 P.C.57; 31 L.W.306 (P.C.); *Bhagat Singh v. Jaswant Singh*, (1962)1 S.C.J. 162= A.I.R.1966 S.C.1861; *Tungabai v. Yeshwant*, L.R. (1944) 71 I.A.184= (1944)2 M.L.J.350= A.I.R.1945 P.C.8; *Inche Noriah v. Sheik Allie*, (1929) 56 M.L.J.349= A.I.R.1929 P.C.3: 29 L.W. 196; *Kaufman v. Cerson*, (1904)1 K.B.591; *Rama Patter and Brothers v. Manikam*, I.L.R. (1935) 58 Mad.454= 69 M.L.J.104= A.I.R.1935 Mad.726: 41 L.W.228; *Ladli Prasad Jaiswal v. Kernal Distillery Company Limited*, (1964)2 S.C.J. 12= A.I.R.1963 S.C.1279= (1964)1 S.C.R. 270; *Raghunath Prasad v. Sarju Prasad*, L.R. (1924) 51 I.A.101= 46 M.L.J. 610= A.I.R. 1924 P.C.60: 19 L.W.470; *Poosathurai v. Kannappa Chettiar*, L.R.(1920) 47 I.A.1= 38 M.L.J.349= I.L.R. (1920) 43 Mad.546= A.I.R.1920 P.C.65; *Subhash Chandra v. Ganga Prasad*, (1967)2 S.C. J.159= (1967)1 S.C.R. 331= A.I.R.1967 S.C.878.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of Ismail, J. dated 15th July, 1975 in App.843 and 844 of 1971 - O.S.No.22 of 1967 and 144 of 1968 Sub-Court, Cuddalore.

R.Kesava Iyengar for *K.Yamunan*, for Appellant.

M.R.Narayanaswamy for *R.Srinivasan*, for Respondent.

The Judgment of the Court was delivered by

Shanmukham, J.:- These appeals are directed against the judgment of Ismail, J. (as he then was) in A.S.Nos.843 and 844 of 1971. The learned Judge set aside the common judgment and decrees of the learned Subordinate Judge of Cuddalore in O.S.Nos.23 of 1967 and 144 of 1968, respectively.

2. O.S.No.23 of 1967 is by the present appellant for setting aside the sale deed, dated 17th July, 1975 relating to the suit property marked as Ex.B-2, for recovery of possession of the said property and also for recovery of mesne profits, both past and future. Respondents 1 and 2 in L.P.A.No.77 of 1978 are defendants 1 and 2 in that suit. The second respondent is an alienee of the suit property from the first respondent.

3. The case of the appellant is that Ex.B-2 sale for Rs.8,000 was brought about by undue influence, coercion and fraud. According to the appellant, the first respondent, her manager Venkatarama Naidu and her husband (appellant's husband) were in a position to dominate her will having regard to the relative positions they occupied as against her. It is her further case that Ex.B-2 transaction is a most unconscionable one under which the first respondent had obtained an unfair advantage. She further alleged that she is an illiterate, and at the time of execution and registration of Ex.B-2, she was not apprised of the nature and particulars of the transaction. Her further complaint is that D.W.4, the first respondent's manager threatened that if Exhibit B-2 sale deed was not executed, both her husband and herself would be sent to jail. It is her further case that the second respondent's guardian was quite aware of the fact that Ex.B-2 sale is void and unenforceable and therefore, the second respondent is not a *bona fide* purchaser for value. She also stated that she is the real owner of the suit property and the stand taken by the first respondent that she is benamidar for her husband is wholly baseless.

4. The first respondent's defence is that the appellant's husband is the real owner of the suit property, that he has been enjoying the property, paying taxes, etc., and that as he was in need of money he raised a loan with the Bank and executed the mortgage deed in favour of the bank in respect of the suit property along with his wife as the property stood in her name. As the appellant's husband was found guilty of criminal misappropriation to the extent of Rs.25,000 the appellant voluntarily offered to execute Ex.B-2 in order to save her husband from being proceeded against for criminal misappropriation by the first respondent. It is common ground that the appellant's husband was employed in a petrol bunk owned by the first respondent. According to the first respondent, a large sum of nearly Rs.25,000 was found due and payable by the appellant's husband to her and in partial discharge of the said liability, the appellant joined her husband and executed Ex.B-2 sale deed out of her own accord. The charge of misrepresentation, coercion and fraud are false and denied by the first respondent. It is further pointed out that nearly a year after Exhibit B-2, sale and the execution of the promissory note marked as Exhibit B-1, dated 20th July, 1965 for the recovery of which the first respondent had instituted the other suit O.S.No.144 of 1968 against the appellant and her husband, did the appellant give notice to him to which he gave suitable reply. Both the suit notice and the suit are at the instigation of the appellant's husband. It is immediately relevant to notice that the first respondent was the real owner but failed to put forward a defence on the assumption that the suit property belonged to the appellant contending that nevertheless the appellant's case of misappropriation, coercion and fraud are baseless. The second respondent alienee from the first respondent, while adopting the written statement of the first respondent, resisted the suit on the ground that the appellant is a mere benamidar for her husband as she had no funds of her own to acquire the suit property and as she was never in possession in her own right, that her husband alone was in possession of the same, that Exhibit B-2 sale is true, valid and supported by consideration, the same having been executed voluntarily by the appellant and her husband knowing its full implication and that in any event this respondent purchased the suit property for proper value without any notice of any defect in title.

5. O.S.No.144 of 1968 is by the first respondent herein against the appellant and her husband for recovery of Rs. 11,186-83, being the principal and interest

due on Exhibit B-1, promissory note, dated 20th July, 1965, executed for Rs.9,672-51 representing the balance due by the appellant's husband in respect of Rs.25,000 for which he had to account to the first respondent. It is unnecessary to refer to the defence taken by the appellant's husband in this action, because though the trial court dismissed the suit even as against him, he did not prefer any appeal against the judgment and decree made by the learned single Judge of this Court in A.S.No.844 of 1971 setting aside the order of dismissal. It is needless to state that the judgment and decree of the learned single Judge of this Court had become final vis-a-vis the appellant's husband (first defendant in O.S.No.144 of 1968). The appellant's defence in that action is that she did not execute Exhibit B-1 nor did she receive any consideration therefor; even otherwise the consideration under it is illegal, void and opposed to public policy and therefore Exhibit B-1 is unenforceable. According to her, her signatures were taken on various blank sheets of paper, one amongst them bearing stamps and her signatures were taken on the date on which Exhibit B-2 sale was registered at Tindivanam Sub-Registrar's Office on 20th July, 1975. She further submitted that Exhibit B-1 must have been concocted by the first respondent and her partisans on blank sheets of paper which contained her signatures. The recitals in Exhibit B-1 are all false and fraudulent. She never undertook to discharge the liability of her husband; nor did she ever agree to pay the amount covered by Exhibit B-1 to the first respondent.

6. The trial court framed as many as 9 issues in O.S.No.23 of 1967 which are as follows:

1. Whether the suit house had been purchased by the plaintiff with her funds and belonged to her and if not so was the plaintiff only a benamidar for her husband?

2. Whether the sale deed dated 17th July, 1965 executed by plaintiff to first defendant is not valid, not supported by consideration and not true?

3. Whether the said sale deed dated 17th July, 1965 is vitiated by undue influence, coercion and fraud and hence void as allged by plaintiff?

4. Whether the sale deed dated 17th July, 1965 is liable to be set aside for all or any of the reasons stated in the plaint?

5. Whether the second defendant is in any event a *bona fide* transferee for value from first defendant without notice of the rights of the plaintiff to avoid the transaction as alleged?

6. Whether the plaintiff is entitled to past profits and if so at what rate?

7. Whether the suit is not properly valued for the purpose of court fee?

8. Whether even if so, the plaintiff is precluded from putting forward her title to the suit house?

9. To what relief is the plaintiff entitled?

The trial Court observed as regards issues 7 and 8 that they were not argued at all. On other issues it held in favour of the appellant and therefore decreed the suit as prayed for with costs but subject to the payment by the appellant of the mortgage amount which the first respondent paid to the Land Mortgage Bank while it relegated the question of mesne profits to be determined in separate proceedings under Order 20, rule 12, Civil Procedure Code.

7. In the other suit O.S.No.144 of 1968, the trial Court framed the following issues:

1. Whether the suit pronote is true?

2. Whether the suit pronote was executed in the circumstances as mentioned in the written statement of defendants 1 and 2?

3. Whether it is not supported by consideration?

4. Whether it is illegal and opposed to public policy?

5. To what relief if any is plaintiff

entitled? The trial court held issues 1 to 4 in favour of the appellant and her husband (the other defendant in the suit) and therefore dismissed the suit with costs.

8. On appeal, the learned single Judge of this Court framed four points for determination and they are:

1. Whether it is true that P.W.4 had misappropriated the amounts belonging to the appellant with regard to her business as Burmah Shell agent?

2. Whether the execution of Exhibit B-2 sale deed by P.W.1 is vitiated by exercise of undue influence, coercion and fraud?

3. Whether the property at Tindivanam sold under Exhibit B-2 to the appellant was the absolute property of P.W.1 in whose name the title deed stood or was it purchased by P.W.4 out of his funds in the name of P.W.1 not intending to make P.W.1 the exclusive beneficial owner of the said property; and

4. Whether the execution of Exhibit B-1 by P.W.1 and P.W.4 was true and whether the said promissory note is enforceable against them?

9. As far as the third point was concerned, the learned Judge felt that it is really unnecessary to consider the same in view of his conclusions on points 1 and 2. As regards the first point his conclusion is that the misappropriation alleged against P.W.4 (appellant's husband) by the first respondent (appellant before him) and her agent was true and was admitted by P.W.4 himself. As regards the second point, he held that Exhibit B-2 was not vitiated by the exercise of any undue influence as contended by P.W.1 (appellant herein) and that the said document was executed by her with her free consent and with full knowledge that it was a sale deed by which P.Ws.1 and 4 were attempting to discharge part of the amount due to the first respondent by P.W.4 and as a result of the misappropriation of the moneys committed by P.W.4.

10. Before we advert to the arguments advanced by Mr.R.Kesava Aiyangar, learned Counsel for the appellant which were pregnant with substantial substance, it may be useful to take note of the scope of the Letters Patent Appeal. In the decision in *Asho Devi v. Dukhi Sao*, (1975)1 S.C.J.174= (1975)1 S.C.R.64= (1974)2 S.C.C.472= A.I.R.1974 S.C.2048, the Supreme Court has held that the limitation on the power of the Court imposed by sections 100 and 101 of the Civil Procedure Code, cannot be made applicable to an appellate Court hearing a Letters Patent appeal from the judgment and decree of the Court subordinate to the High Court, for the simple reason that a single Judge of the High Court is not a court subordinate to the High Court and that there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from an order of a learned single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact and that the contention of the appellant before them that the Letters Patent Appeal Bench was not in law entitled to reverse the concurrent findings of fact must be negatived and also that under Clause 15 of the Letters Patent an appeal lies from a judgment and decree without any limitation being imposed upon the powers of the Appellate Court and the whole decree lies open before the court. It is significant to notice that in this case the learned single Judge of this Court reversed the finding of the learned trial Judge. If so, the principle enunciated by the Supreme Court will operate with more vigour here than in a case where both the trial Judge and the learned single Judge of this Court sitting in first appeal concurred with the findings of facts.

11. As the appeal L.P.A.No.77 of 1978 is more comprehensive, we propose to deal with it in the first instance. It is also convenient to advert to the defence taken by the second respondent even at the outset. His principal defence is that he is a *bona fide* purchaser for value without any notice of any defect in title. We may add that as regards the other defence, viz., the appellant is only a benamidar for her husband, it would be dealt with by us in due course. It is needless to state that even if the defence of the first

respondent were to be negatived yet the second respondent is entitled to succeed if he were to successfully establish his defence that he is a *bona fide* purchaser for value as aforesaid.

12. The immediate question that arises for consideration is whether the appellant had adduced proof of the second respondent's guardian's knowledge of the defect in title. In the instant case, we find that there is intrinsic evidence in the documents produced and relied on by the respondents themselves to positively suggest that the said guardian, be it the second respondent's paternal grandfather or his father was sufficiently put on notice of such defect. It is no gainsaying that the evidentiary value of the document is undoubtedly superior to the oral testimony. It is stated in Exhibit B-2, the registration copy of which is marked as Exhibit A-37, that the suit property was purchased from Shanmugam Pillai out of the earnings of the appellant's husband, that the said property had been in the possession and enjoyment of the appellant and her husband and that to compensate the amounts misappropriated by the appellant's husband as an employee in the first respondent's depot in Gingee, the appellant and her husband (executants of Exhibit B-2) had agreed to sell the suit property for Rs.8,000 to the first respondent. It is further recited therein that the vendee (the first respondent) should redeem the mortgage from Tindivanam Co-operative House Mortgage Bank. Had the guardian of the second respondent examined Exhibit B-2, as she is bound in law to do, she must have been put on notice that the consideration for the sale is the appellant's husband's misappropriation in the vendee's business at Gingee and that though the apparent title stood in the name of the appellant, it is alleged therein that she is only a benamidar for her husband. These averments, in our careful consideration, would have excited suspicion in the mind of any *bona fide* or reasonable person, particularly when the property purchased is to benefit a minor. Yet another aspect of intrinsic evidence which would support an inference is that while in Exhibit B-2, it was stated that the suit property was purchased by the appellant's husband out of his earning but in the name of the appellant, in Exhibit B-35, it is stipulated that the schedule mentioned property belonged to both the appellant and her husband. Thus there are two inconsistent and irreconcilable sources of title as regards the appellant on the one hand and her husband on the other. Further an enquiry was found necessary is evident from the lawyer's reply Exhibit A-41 to the appellant's notice Exhibit A-39 sent on behalf of the second respondent's grandmother acting as his guardian. That the grandmother is the guardian of the second respondent is stated in Exhibit A-41 and asserted by D.W.6 in his cross-examination. The evidence of D.W.6 is that he was not shown as guardian in Exhibit B-34, that his mother (the second respondent's grandmother) is the guardian of the second respondent and that it is the said grandmother who gave the reply Exhibit A-41. It is also essential to notice at this stage that it is not the case of the second respondent that though the grandmother was the guardian D.W.6 looked after all the transactions since negotiation till the execution and registration of Exhibit B-35 because the said guardian is very old. For a reference to Exhibit A-41 discloses that the said reply was sent under instructions of the minor's grandmother. We had just now referred to the evidence of D.W.6 in cross-examination. He also asserted that it was his mother who was the guardian and gave instructions contained in Exhibit A-41, reply notice obviously meaning that instructions were given by her to the counsel. While so, there is every force in the contention advanced by Mr.Kesava Aiyangar, learned Counsel for the appellant, that in the light of the above admitted evidence, non-examination of the minor's grandmother is fatal to the defence. He fortified his submission (sic) by relying on the ruling of the Supreme Court reported in *Gopal Krishnaji v. Mohd. Haji Latif,* (1968)2 S.C.J.934= (1968)3 S.C.R.862= A.I.R.1968 S.C.1413. The Supreme Court succinctly laid down the principles in the said decision thus:

"Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds important documents in his possession

> which can throw light on the facts at issue. It is not in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

In our view, the above dictum would be applicable with great vigour to the instant case, for, we had earlier pointed out that the contents in Exhibits B-2 and B-35 are enough to put the minor's guardian on notice about the defect in title and that in Exhibit A-41 it was alleged that such an enquiry was made. A fair reading of Exhibit A-41 would indisputably establish that no enquiry was made by the grand-mother, because she gave instructions to send the notice and because there is no evidence that on her behalf her son D.W.6 played all the role in all the transactions. To put it differently, though the guardian was put on notice, no evidence was placed at the instance of the second respondent to prove that there was such an enquiry and that despite such enquiry the defect was not noticed. We have to reiterate that there is no reference to D.W.6 ever taking any part either in the negotiations or in the end transaction, the sale under Exhibit B-35 in Exhibit A-41. It would immediately follow that no weight can be attached to the evidence of D.W.6 on this vital aspect of enquiry. Even otherwise, as per the ruling of the Supreme Court, cited supra, the best witness is kept out of Court. These are not all. While Exhibit B-35 was executed as early as on 29th December, 1965 it came to be registered on 20th April, 1966. Even D.W.6 admitted that it is D.W.4 (the first respondent's manager) who conducted all the negotiations and finalised the sale under Exhibit B-35. We will be referring, in due course, theat D.W.4 is the archvillain in bringing about not only Exhibit B-2, but also Exhibit B-35. Further the evidence of D.W.6 is that he did not notice who was the predecessor-in-title and that though he saw Exhibit B-2, he did not care to read the contents thereof. He further deposed that he did not know in whose favour the prior title stood and under what circumstances the sale deed came to be executed by the predecessor-in title, obviously referring to Exhibit B-1. Even in the chief examination he would add that because the first respondent was doing business in a large scale, he thought that he could purchase the property. This admission on the part of D.W.6 is enough to conclude that no enquiry at all was made on behalf of the minor purchaser notwithstanding that the documents themselves reveal that defect. If, according to D.W.6, D.W.4 was simply trusted and D.W.4 brought about all the transactions resulting in the execution and registration of Exhibit B-35, it is reasonable to infer that the minor's guardian is not a *bona fide* purchaser for consideration without notice of the defect. In the last but the third and fourth paragraphs of the judgment of the learned single Judge, of this Court, this aspect has been dealt with. According to the learned Judge:

> "There is absolutely nothing to indicate that a perusal of the sale deed Exhibit B-2 by any person will convince that person that the title of the vendee therein was not a perfect title. Equally there is nothing improbable or unnatural in a wealthy person disposing of a property which he or she had purchased. Consequently, the case of P.W.1 in this behalf that the purchase by the second appellant in the former appeal was not *bona fide* and that he was not a transferee for consideration has not been established."

He relied upon the following circumstances to support his finding. Nearly a year after Exhibit B-2, the appellant caused Exhibit A-39 notice to be issued. The appellant's explanation for the delay in sending the lawyer's notice was not acceptable. Her evidence that Exhibit A-39 came to be issued two months after obtaining the registration copy of Exhibit A-37 is therefore, not correct. According to the learned Judge, therefore this conduct on the part of P.W.1 (the appellant herein) will lead to the inference that P.W.1 and P.W.4 (the appellant's husband) originally executed Exhibit B-2 with the full knowledge that it was a sale deed and that it was being executed to liquidate the amount due by

P.W.4 to the appellant therein (first respondent before us) but only later, they wanted to make something out of it and probably they wanted to get some more money from the appellant and that was the cause for the present suit. He further found that there is material discrepancy between the evidence of P.W.1 and her son-in-law P.W.3 for P.W.1 stated in her evidence that the second respondent came to her daughter's house and asked her whether she could purchase the suit house and that P.W.1 told her that there was a case relating to the suit property and asked her not to purchase the same but then P.W.3 had stated in his evidence that P.W.1 did not come to his house at all during the relevant period. With great respect to the learned Judge, he has fallen into factual errors while he negatived that the explanation put forward is not true and that there is discrepancy between the evidence of P.W.1 and P.W.3. Exhibit A-37 is the registration copy of Exhibit B-2. For issuing the suit notice Exhibit A-39, the appellant had to obtain not only the registration copy of Exhibit B-2 sale but also that of Exhibit B-35 sale. We had earlier pointed out that Exhibit A-37 is the registration copy of Exhibit B-2, while Exhibit A-38 is the registration copy of Exhibit B-35. A reference to Exhibit A-38 shows that the registration copy was applied for on 1st June, 1966 and it was prepared and delivered on 3rd June, 1966. As between 3rd June, 1966 and 25th July, 1966 when Exhibit A-41 was issued, the interval was only about 2 months. It is pertinent to notice what P.W.1 deposed is:-

> "அதற்கு பிற்பாடுதான் நான் பத்திர நகல் எடுத்தேன். நானே போய் பத்திர நகல் எடுத்தேன். உடனே நோட்டீஸ் அனுப்பவில்லை. கையில் பண வசதி இல்லாததால் 2 மாதம் கழித்துக் கொடுத்தேன்".

Factually P.W.1 made no reference to Exhibit A-37 when she said that she gave notice 2 months after. On the other hand, her evidence is so clear that she gave notice 2 months after she contained the registration copies of Exhibits B-2 and B-35. If so, the reasoning of the learned Judge referred to above cannot be sustained. It is true that P.W.1 had stated that the second defendant came to her daughter's house and asked her whether she (second defendant) could purchase the suit property for which she (P.W.1) told her that since the said property is involved in a case, she should not purchase the same. The learned Judge is not right when he stated that P.W.3 had deposed that P.W.1 did not come to his house at all during the relevant period for his evidence is:

> நான் போகுமுன் ரிஜிஸ்டர் முடிந்து விட்டது P.W. 1 அழுது கொண்டு போனதாக சொன்னார்கள். அப்போது என் மனைவி 6 மாதம் கர்ப்பிணி. என் மாமியார் என் வீட்டிற்கு வந்து ஒரு வேளை தங்கி சாப்பிடுவார்கள். இசயம் கொடுத்தபின் என் மாமியார் என் வீட்டிற்கு வரவில்லை. வேறு குடி போனபின் குழந்தையை பார்க்க வந்தார்கள்

13. It is pertinent to notice that Exhibit B-2 is dated 17th July, 1965 and Exhibit B-35 is dated 29th December, 1965. From the evidence extracted above, P.W.3's wife would have given birth to a child in about 4 months. This period certainly falls within the above interregnum. Therefore, we are unable to find any inconsistency. The other important factor to be noticed in this connection is that there must have been some misunderstanding by P.W.1 and also by the learned trial Judge when the former spoke about the visit of 'D.2'. It is important to note that the second defendant is a minor though he is represented by his father D.W.6, as guardian. Thus a reference to the second defendant in the deposition of P.W.1 is an obvious mistake. It might be that P.W.1 was rather referring to the minor's grandmother, becuase in the deposition as recorded by the learned trial Judge we find the following -

> D. 2 என் வீட்டிற்கு வந்திருந்தார் தாவா வீட்டை வாங்கலாமா என்று கேட்டாள். வழக்கு இருக்கிறது வாங்காதீர்கள் என்று சொன்னேன். அப்பவே D-2 வாங்கி விட்டதாக சொன்னாள்.

It is significant to notice that the reply notice was sent only by the minor's grandmother but not by his father. In the cyclostyled copy of the deposition prepared by this office for the purpose of A.S.No. 843 of 1971 it is wrongly prepared as follows: -

என் பெண் வந்திருந்தாள் தாவா வீட்டை வாங்கலாமா என்று கேட்டாள். வழக்கு இருக்கிறது வாங்காதீர்கள் என்று சொன்னேன். அப்பவே D-2 வாங்கிவிட்டதாக சொன்னாள்.

The expedient course is not to be, therefore, influenced one way or the other by that part of the evidence of P.W.1 because of the foregoing circumstances. For the reasons stated above, we find that the finding of the learned Judge of this Court can hardly be supported by evidence.

14. In the result, we are constrained to set aside his finding and restore that of the learned trial Judge.

15. The next question to which we propose to advert is the issue relating to benami theory. It is by now well settled that the burden is on the person who sets up the case of benami, in the instant case the respondents (defendants) and that if the burden is not discharged, the ostensible title will prevail. To substantiate a case of benami, the judicial pronouncments have laid down, several factors have to be taken into consideration and on an over-all assessment of such factors is the Court to render a finding. The relevant factors are: (a) the consideration; (b) possession and enjoyment of the property; (c) possession of the title deeds; (d) motive; and (e) mutation in the public records. Further, if the benamidar and the real owner were to be related as wife and husband, or concubine and paramour, the payment of consideration by the husband or paramour as the case may be, would not be decisive, for, it is most likely that the husband or paramour intended to benefit the wife or the concubine. We had already referred to the inconsistency as regards source of title to P.W.1 or P.W.4 as between Exhibit B-2 and Exhibit B-35. We recall the same at this juncture to point out that there is no consistency in the defence on this vital aspect. In Exhibit B-2, it was recited that out of the earnings of P.W.4, the suit property was purchased. However, nothing was elicited from P.W.4, as to the date of his employment, particulars of his employment, particulars of his salary and his savings. It has to be immediately pointed out that none of the defence witnesses had ever spoken to these relevant matters. Thus, no satisfactory evidence is placed before the Court in proof of the means of P.W.4 at the time of purchase under Exhibits A-2 and A-3. It may not be out of place to point out that from the evidence it is possible to conclude that P.W.4 would not have been in employment at the time of Exhibits A-2 and A-3. According to D.W.5, P.W.4 had 18 years of service. Evidence was given on 19th September, 1971. This will take us to about 1953. D.W.4 would depose that he came to be employed in the first respondent's service on 1951 and that even before that P.W.4 was working under D.W.5. All these will suggest that P.W.4 would have got employed only in 1951. In any event, it is most unlikely that P.W.4 would have saved Rs.2,000 to find the consideration for Exhibits A-2 and A-3. As the parties are related as husband and wife, possession and enjoyment of the property would not throw any definite light and therefore, we leave this out of consideration. As regards possession of document of title, the property came to be mortgaged with the Tindivanam Co-operative House Mortgage Bank under Exhibit B-33, dated 24th September, 1962, and mortgage deed executed both by P.Ws.1 and P.W.4. It is the evidence of P.W.1, that as she happened to be a woman, the Bank insisted that her husband should also join the execution of the mortgage deed. A reference to Exhibit B-33, would reveal that a printed form of mortgage deed was utilised by the Bank. Therefore, even this has to be left out of consideration. As regards, motive, there is neither pleading nor evidence, as rightly pointed out by the learned trial Judge. Fortunately, for the appellant, the property is registered in her name in the records of Tindivanam Municipality as seen from Exhibits A-11 to A-19, which are all house tax receipts issued in her name. On the top of it all, Exhibit A-20, dated 2nd July, 1956 is the plan submitted by the appellant for effecting improvements. In that document the appellant alone had signed as owner. The above conspectus will undoubtedly establish that far from the respondents discharging their burden, the appellant has satisfactorily established that she is not the benamidar but is the real owner. At any rate,

we have to reiterate that the burden had not been discharged and in such a case as already pointed out, the ostensible title will have to be upheld.

16. With reference to this issue, the learned Judge of this Court has observed thus:

"As far as the third point is concerned, it is really unnecessary to consider the same in view of my conclusions on points Nos.1 and 2. Once it is held that P.W.1 executed the sale deed Exhibit B-2, voluntarily ans with full knowledge of its contents as a sale deed, it is totally irrelevant whether the property belonged to her or not."

Two possibilities emerge from the above observation. The first is that he did not want to disturb the finding of the learned trial Judge while the other is that the learned Judge would have proceeded on the assumption that the real owner is P.W.1, but yet her case regarding undue influence, coercion and fraud was not established.

17. According to Mr.Kesava Aiyangar, learned Counsel for the appellants, the respondents restricted their defence that P.W.4 is the real owner, but failed to plead a case in the alternative to the effect that even assuming that P.W.1 is the real owner, yet, the case of undue influence and coercion is not true. He would further submit that in the absence of an alternative pleading, the Court shall not look into the evidence on this aspect. Relying upon the decision in *Atta Md. v. Emperor*, (1930) 57 I.A.71= 58 M.L.J.363= A.I.R.1930 P.C.57= 31 L.W.306 (P.C.), the learned Counsel would urge that the prohibition is addressed to the Court whereby the Court is restrained from looking into the evidence because there is no pleading on that matter. A proper reading of the written statement filed by the first respondent clearly shows that though such an alternative plea is not expressly pleaded, she had not only denied the undue influence and coercion but also stated that Exhibit B-2 transaction was a voluntary one entered into by the appellant with full knowledge and consent and that the first respondent had not had any unfair advantage. The said defence taken by the first respondent as regards undue influence and coercion will fairly indicate that they are setting forth the defence on the alternative case based on the assumption that P.W.4 is the real owner. The draftsman is not the first respondent herself but luckily for her the statements of fact in relation to undue influence and coercion are well brought out in the written statement. If so, it would be rather unjust to read the written statement as not raising a defence on the alternative case. We are, therefore, unable to agree with the learned Counsel for the appellant that because no alternative case is pleaded, the evidence should not be looked into and also that the approach of the learned Judge of this Court in not deciding this issue relating to benami had vitiated his judgment.

18. So it is rather unnecessary to peep into the two decisions cited by the learned Counsel for the appellant namely *Atta Md. v. Emperor*, (1930) 57 I.A.71= 58 M.L.J.363= A.I.R.1930 P.C.57= 31 L.W.306, (P.C.) and *Bhagat Singh v. Jaswant Singh*, (1962)1 S.C.J.162= A.I.R.1966 S.C.1861.

19. It is now convenient to advert to the first point for consideration as determined by the learned Judge of this Court. The finding of the learned Judge is that the misappropriation alleged against P.W.4 by the first respondent and her agent D.W.4 was proved and was admitted by P.W.4 himself. The learned Judge also pointed out that Mr.Kesava Aiyangar who appeared for P.W.1 and P.W.4 dealt with this as the last point and did not, in fact argue anything in the face of the evidence available on record. The learned Counsel before us submitted that his contention on this aspect was not understood in the proper perspective. There is no need for us to get ourselves entangled on this very nice controversy. Fortunately for us, the substratum of the argument advanced by the learned Counsel hinged upon as to whether the appellant had not succeeded in substantiating that Exhibit B-2 was brought about under undue influence, coercion and fraud. In short the submission turned upon the assessment of evidence

in this case. This, in turn, takes us to examine issue Nos.2,3 and 4 as framed by the learned trial Judge and point No.4 as formulated by the learned Judge of this Court.

20. Before we proceed to assess the evidence in this case, it is useful to look at the position of law. Immediately it has to be noticed that the appellant's case is not that the document is void *ab initio* as offending section 23 of the Contract Act, but is voidable by virtue of undue influence, coercion and fraud practiced on her both by P.W.4 and D.W.4. Section 16 of the Contract Act defines what is undue influence. Section 16 reads as follows:

> "16(1). A contract is said to be induced 'by undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another.
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proof that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

21. A close examination of the said provision reveals that under circumstances set out in section 16(1) a case of undue influence is established. If the circumstances set out either in sub-clause (a) or sub-clause (b) in sub-section (2) are found to be established, a person is deemed to be in a position to dominate the will of another. Sub-section (2) is common to sub-section (1) and sub-section (3) of Section 16. As between sub-section (1) and sub-section (3), the common factor is that one of the parties was in a position to dominate the will of the other. Sub-section (1) and sub-section (3) cover two different fields, though at times, one may overlap the other. To attract sub-section (1) two things should be established, namely, (a) one of the parties was in a position to dominate the will of the other and (b) used that position and obtained an unfair advantage over the other; while to attract sub-section (3) (a), the person was in a position to dominate the will of the other, and (b) the transaction appeared on the face of it or on the evidence adduced to be un-conscionable. There is another vital difference between sub-section (1) and sub-section (3). In sub-section (3), if the two ingredients are established, the burden of proof that contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. This presumption is absent in sub-section (1). This, in our view, is the proper reading of section 16 of the Contract Act. Another special feature is found in section 16(3); i.e., if it is established that a person who is in a position to dominate the will of another entered into a contract with him and if the transaction appeared either on the face of it or on the evidence adduced to be unconscionable, the burden is upon the person who was dominating the will of another to prove that such contract was not induced by undue influence. The word 'shall' found in section 16(3) indicates that the presumption is mandatory. In the instant case, if the ingredients referred to in section 16(3) were to be established by the appellant the burden would be on the respondents to satisfactorily prove that Exhibit B-2 sale was not induced by undue influence. The concomitant position is that if the burden is not discharged, the presumption

shall prevail. It is further significant to notice that either on the evidence or on the face of the transaction it is enough if it appeared to be unconscionable. In other words, it is enough for the appellant to substantiate that the transaction was *prima facie* unconscionable and that she was under the domination of her husband, P.W.4 and the first respondent's manager, D.W.4. To put it differently, positive proof that the transaction is unconscionable is dispensed with to raise a statutory presumption and the statutory presumption would be in force until the burden is rebutted. According to the learned Counsel for the appellant, this import of clause (3) of section 16 was not noticed by the learned Judge of this Court and the result was the learned Judge threw the burden wrongly on appellant. This according to the learned Counsel, has to a greater extent vitiated the judgment of the learned Judge. He would further urge that there are enough circumstances to project a *prima facie* case as envisaged by section 16(3) and that in any event, there is ample evidence in this to support misrepresentation, coercion and fraud.

22. Section 16(2) says what is domination. If a person should hold either a real or apparent authority over the other, he would be deemed to be in a position to dominate the will of another (emphasis by us). We shall not lose the significance of the expression 'real' and 'apparent' employed in that sub-section. In our view, even if the circumstances were to project that one had apparent authority over the other, it would be deemed that person dominated the will of the other as envisaged by sub-section (2) of Section 16. So too, if a person were to stand in a fiduciary relationship with the other, the former would be deemed to have dominated the will of the other. We are not referring to sub-section (b) as that is not relevant in this case. The plain meaning of sub-section (2) clearly points out that the relationship between the two has no relevance at all though it may in certain cases project a *prima facie* case.

23. It is now worthwhile to refer to the citations brought to our notice in this context. They are *Tungabai v. Yeshwant*, L.R. (1944) 71 I.A.184= (1944)2 M.L.J.350= A.I.R.1945 P.C.8; *Inche Noriah v. Sheik Aliee*, A.I.R.1929 P.C.3= 29 L.W.196= (1929) 56 M.L.J.349; *Kaufman v. Cerson*, (1904)1 K.B.591, *Rama Patter and Brothers v. Manikam*, (1935) I.L.R..58 Mad.454= 69 M.L.J.104= A.I.R.1935 Madras 726= 41 L.W.228, *Subhas Chandra v. Ganga Prasad*, (1967)2 S.C.J.159= (1967)1 S.C.R.331= A.I.R.1967 S.C.878. This is relied on by both the counsel) and *Ladli Prasad Jaiswal v. Karnal Distillery Company Limited*, (1964)2 S.C.J.12= (1964)1 S.C.R.270= A.I.R. 1963 S.C.1279. These are all cited by the learned Counsel for the appellant. The learned senior counsel for the respondents brought to our notice the decisions in *Raghunath Prasad v. Sarju Prasad*, (1924) L.R.51 I.A.101= 46 M.L.J.610= A.I.R.1924 P.C.60= 19 L.W.470 and *Poosathurai v. Kannappa Chettiar*, L.R. (1920) 47 I.A.1= 38 M.L.J.349= I.L.R. (1920) 43 Mad.540= A.I.R.1920 P.C.65. The learned senior Counsel for the respondents contended that in all cases if the facts were either under section 16(1) or under section 16(3), these provisions would not be attracted unless there is proof that P.W.4, and D.W.4 dominated the will of the appellant. He would further submit that on the evidence in this case the factum of domination as alleged by the appellant was not established at all. The facts in *Tungabai v. Yeshwant Jog*, (1944)2 M.L.J.350 are:- The husband was heavily in debt; he had mortgaged all his own property and, being pressed for money had nothing to offer by way of security for a further loan other than his already encumbered estate. He approached his creditor for a further loan of Rs.7,000 but the latter was unwilling to lend it either on the security of the husband's encumbered lands or on a promissory note. So the only security which could be offered was the wife's land. The wife was quite illiterate; unable to read or write, but could sign her name. Her husband managed the wife's property entirely; she was a submissive wife, and if her husband told her to execute a document she did so at his bidding and without informing herself of the contents. The wife's property brought some income on which the family had to depend and the wife executed the mortgage deed for Rs.7,000 for the

husband's benefit and received nothing out of the amount herself. On those facts the Privy Council held that the wife was acting under the influence of her husband for whose benefit the mortgage was being executed and that the creditor who benefited by the transaction had notice of the facts which raised presumption and, hence, he was in no better position than the husband who exercised influence. It was further held that it was unnecessary to decide whether there was actual fraud by the husband; it was enough to show that the wife was acting under his influence and not as a free agent; considering that he was at the end of his resources and that the income from the wife's property was all that was to support the family it was a most improvident thing to mortgage their only means of livelihood for the purpose of using at any rate a substantial portion of the money to pay off antecedent debts of the husband, and an action which no right-minded person ought to have entertained. This decision cited with approval the earlier decision of the Privy Council in *Inche Nonah v. Shaik Allie*, (1929) 56 M.L.J.349= A.I.R.1929 P.C.3= 29 L.W.196. There the donee who was related as nephew of the donor took advantage of the fact that the donor was a feeble old woman unable to leave the house and entirely trusted the donee, and the donee took a settlement deed. The principle is settled as follows by the Privy Council:-

> "That the relations between the donor and donee were sufficient to raise the presumption of the influence of the donee over the donor and to render it incumbent upon him to prove that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will, and which justified the court in holding that the gift was the result of the free exercise of her will."

We do not find the principle laid down in *Kaufman v. Gerson*, (1904)1 K.B.591 is ever applicable to the facts in this case, because, as already pointed out by us, it is not the case of the appellant that the consideration for Exhibit B-2 was to stifle the prosecution and opposed to public policy but then the document came to be executed by her because of undue influence, coercion and fraud. The ratio laid down by a Division Bench of this Court in *Rama Pattar and Brothers v. Manikkam*, (1935) I.L.R.58 Mad.454= 69 M.L.J.104= A.I.R.1935 Mad.726= 41 L.W.228 as appropriate for the present case is that in a case of undue influence and fraud the mere fact that on one or two matters the court does not accept a party's evidence will not disentitle him to relief, for, in such cases conclusion of the Court rests not so much upon direct evidence showing that any deception was practised as upon inferences arising from the situation of the parties and nature and effect of the transaction the creditor himself exercised undue influence or took benefit under that transaction with notice that that transaction was the result of undue influence exercised by the debtors, the nature of the transaction would suffer the same infirmity. In *Subash Chandra v. Ganga Prasad*, (1967)2 S.C.J.159= (1967)1 S.C.R.331 the facts are as follows:

> "The suit in the present case was for declaring that a deed of settlement executed by the plaintiff's father and the plaintiff's sister in favour of the plaintiff's brother's son in respect of certain properties was fraudulent, collusive and invalid and for cancellation of the said document. The trial Court dismissed the suit. However in appeal the High Court proceeded on the basis that in the circumstances of the case and in view of the relationship of the parties the trial Court should have made a presumption that the donee had influenced over the donor and should have asked for proof from the respondents before the High Court that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which would justify the Court in holding that the gift was the result of a free exercise of the donor's will. The High Court went on to presume from the great age of the donor that his intelligence or understanding must have deteriorated with advancing years and consequently, it was for the Court

to presume that he was under the influence of the younger son at the date of the gift. In appeal before this Court it was contended on behalf of the defendant-appellant that the judgment of the High court had proceeded on an entirely erroneous basis and that there was no sufficient pleading of undue influence nor was there any evidence adduced at the trial to make out a case of undue influence."

On those facts, the Supreme Court laid down the following principle:-

"The law as to undue influence is the same in the case of gifts *inter vivos* as in the case of a contract and the Court trying a case of undue influence must consider in view of section 16(1) of the Indian Contract Act, two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Sub-section (2) of section 16 illustrates as to when a person is considered to be in a position to dominate the will of another. These are *inter alia* '(a) where the donee holds a real or apparent authority over the donor, or (b) when he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Sub-section (3) of the section throws the burden of proving that a contract was not induced by undue influence on the person benefited by it when two factors are found against him namely that he is in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced to be unconscionable.

Thus under section 16 the unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. But the High Court neither determined the relationship of the parties as required in section 16(1), nor did it find that the transaction was unconscionable. Therefore, the presumption made by it was unwarranted by law.

(ii) Before a court is called upon to examine whether undue influence was exercised or not it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. These conditions remained unsatisfied in the present case.

(iii) On the evidence in the case the trial court was right in its conclusion that the donor was fully aware of the fact that he had transferred the property to defendant No.1. It had not been established that he was of unsound mind.

(iv) There could be no presumption of undue influence merely because the donor and the donee were nearly related to each other. Nor could the fact that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death show that the transaction was unconscionable."

It is relevant to notice that the Supreme Court has only quoted the following observations from *Raghunath Prasad v. Sarju Prasad and others, (1924) 51 I.A.101=* 19 L.W.470= A.I.R.1924 P.C.60:

"The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the other?"

23. A reading of the Supreme Court judgment will reveal that except what they have quoted above, the learned Judges have not expressed their views one way or the other. Immediately after the quotation, the Supreme Court observed:

"It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise."

Therefore, it cannot be understood that

the Supreme Court had subscribed their concurrence to the above observations. We had taken some pains to refer to this passage because the section as such does not make any reference to relationship. It may be stated that in that case the Supreme Court set aside the judgment and decree of the High Court particularly because the case of undue influence had not been sufficiently alleged either in the pleadings or substantiated on the evidence adduced. Two matters on which the principles of law are settled by the Supreme Court are enough to be noticed. The first is that a vague or general principle regarding undue influence can never serve the purpose or satisfy the requirements of Order 6, rule 4 of the Civil Procedure Code, that the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other, that the rule had been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise and that a plea of undue influence must to serve the dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading. The other principles relate to construction of section 16 and we quote the following from the decision of the Supreme Court in *Ladli Prasad Jaismal v. Karnal Distillery Company Limited*, (1964)2 S.C.J.12= (1964)1 S.C.R.270= A.I.R. 1963 S.C.1279.

"A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction; he has to prove that the other party to a transaction was in a position to dominate his will and that the party had obtained an unfair advantage by using that position. Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress Where it is proved that a person is in a position to dominate the will of another (such) proof being furnished either by evidence or by the presumption arising under sub-section (2) and he enters into a transaction with that other person, which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-section (3) has manifestly a limited application, the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift."

No doubt, in that case the Supreme Court, on the evidence, stated that the High Court was in error in relying upon the presumption under sub-section (3) of section 16, because in their view the evidence did not justify the conclusion that the plaintiff was in a position to dominate the will of the defendants and that the transactions gave an unconscionable advantage to the plaintiff. The decisions in *Raghunath Prasad v. Sarju Prasad*, (1924) 46 M.L.J.610= A.I.R.1924 P.C.60= 19 L.W.470 (P.C.), *Subhash Chandra v. Ganga Prasad*, (1967)2 S.C.J.159= A.I.R.1967 S.C.878 have already been noticed and there is no need to advert to it once over. As for the decision in *Poosathurai v. Kannappa Chettiar*, L.R. (1920) 47 I.A.1= 38 M.L.J.349= A.I.R.1920 P.C.65= 11 L.W.455 (P.C.), it is enough to notice the ratio laid down therein which is as follows:

"It is a mistake to treat undue influence as having been established by a proof

of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Upto that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the Law of India or the Law of England, more than mere influence must be proved so as to render influence in the language of the law 'undue'. It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. And where the relation of influence as above set forth, has been established, and the second thing is also made clear, viz., that the bargain is with the 'influence' and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him and it is a heavy burden of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent."

Of course, in that case the Privy Council upheld the decision of the High Court which reversed the decree of the learned Subordinate Judge and held that the undue influence was not proved.

24. Let us now turn to the evidence. While the learned Counsel for the appellant covered this field with most minute details, the learned Senior Counsel for the respondents argued that we should go by the broad probabilities in this case particularly emphasising on the finding that P.W.4, the appellant's husband, had embezzled the moneys of the first respondent as her employee and also pointed out that it is not uncommon that a Hindu dutiful wife would sacrifice her personal property for the sake of her husband. According to the learned Senior Counsel, it is the feeling of reparation that has persuaded the appellant to voluntarily execute Exhibit B-2. Had the facts been so simple as suggested by the learned Senior Counsel and had the appellant's husband been once and for all exonerated in lieu of Ex.B-2 transactions, it might be that the transaction cannot be presumed to be unfair or unconscionable. As a matter of fact, these submissions prevailed upon the learned single Judge of this Court as can be seen from his reasoning: "To save him from his predicament, P.W.1 should have agreed to Ex.B-2 as well as to join in the execution of the promissory note and that would have been the natural reaction of any wife when she finds that her husband has misappropriated a huge amount of his employer and therefore, he had to make good the amount" and "the contention of Mr.M.R.Narayanaswami is that what P.W.1 and P.W.4 have done in the present case is to make a reparation and such making of reparation should be encouraged, and that P.W.1 and P.W.4 having offered to make the reparation ought not to be allowed to go back on what they have done. I am inclined to agree with this contention. The execution of Ex.B-2, the sale of lorry and the execution of Exhibit B-1 are all in the nature of making reparation with regard to the swindling of the appellant's money by P.W.4 and there is nothing illegal about the making of such reparation and making of such reparation could not be challenged on the ground of exercise of undue influence. Hence, my conclusion on this point is that no threat was administered to P.W.1, in order to enable her to challenge Exhibit B-2, the sale deed, on the ground that it was vitiated by the exercise of undue influence and that her consent to the same was not free." But, in this case, there are complex circumstances. The evidence adduced by the respondents is not only mutually contradictory but is also unconvincing and unworthy of acceptance and on top of it all the possessions of P.W.1 and P.W.4 were not only stripped off in the process of alleged reparation but they were also called upon to execute Ex.B-2 promissory note.

25. As rightly pointed out by the learned Counsel for the appellant, the learned Judge was not right when he expressed the opinion that the possibilities of the case are against such stand of P.W.1, that

he had already referred to the fact that the evidence of D.W.4 was that he asked P.W.4 to get P.W.1 to the Company's premises at Gingee on 16th July, 1965 and that she accordingly came to the depot and agreed to execute the sale deed and that if that was true, it would mean that Ex.B-2 was written and executed after P.W.1 and P.W.4 had agreed to execute the same and therefore the question of administration of any threat at the time of obtaining the signature on 17th July, 1965, did not arise. Finally, he concluded as follows. "Under these circumstances, I am clearly of the opinion that when P.W.1 executed Ex.B-2 she was not subjected to any threat that she would be sent to jail or her husband would be sent to jail and the document was written and executed as a result of the prior understanding between the parties." The prior understanding as already referred to is said to have taken place on 16th July, 1965 at Gingee at the first respondent's company's premises. First of all, this case was not pleaded. Secondly, this particular aspect was not put to P.W.1, in the course of cross-examination. Further, even D.W.5 the first respondent herself had not spoken to this in the witness box. Above all, for the first time, this is whispered by D.W.4, the first respondent's manager in his cross examination and the relevant evidence is that on 16th July, 1965 after meals D.W.4 went to Gingee and asked P.W.4 to get P.W.1 and that P.W.1 on 16th evening agreed to execute the sale deed. It is also relevant to notice that his further statement is to the effect that he did not instruct his counsel to put this case to P.W.1 and P.W.4 because he thought that it was wholly unnecessary. It is this piece of evidence which was accepted by the learned Judge in spite of the infirmities stated supra and also to be stated infra. On top of all, the above statement of D.W.4 in the cross-examination can hardly be reconciled with his evidence in chief. In the chief examination D.W.4 had stated that on 16th evening the stamp paper for Ex.B-2 was arranged to be purchased at Tindivanam and that, thereafter D.W.4 and P.W.4 went to Gingee and that it was agreed that as the title deeds stood in the name of P.W.1, both P.W.1 and P.W.4 should join the execution of the sale deed agreed to be executed, that on 17th P.W.4 was at Gingee, that the stamp papers were purchased on 17th and were brought by P.W.4, that in Gingee depot Srinivasan prepared a draft, that the same was read over to P.W.4, that P.W.4 approved the same and that thereafter Exhibit B-2 was prepared. The above evidence will rule out the possibility of D.W.4 having met P.W.1 on the 16th evening. This self-contradictory statement made by D.W.4 was also not noticed by the learned Judge. Quite rightly, therefore, was the learned Counsel for the appellant well-founded in his criticism that the learned Judge has wholly erred in believing that there is evidence that on the 16th evening P.W.1 agreed to D.W.4 to execute the sale deed. Such an erroneous approach by the learned Judge will certainly have a telling effect on his decision.

26. According to the learned Judge, for the first time P.W.4 stated in her evidence that P.W.4 threatened that she as well as her husband would be sent to jail if she did not execute the document Ex.B-2, that P.W.2 did not say about anybody being sent to jail, that he merely stated that D.W.4 stated that if P.W.1 did not sign it could lead to a criminal case and that the evidence of P.W.3 is different while he stated that D.W.4 threatened P.W.1 that P.W.4 would be sent to jail. But in the plaint in paragraph 5 the following averment is found. "petitioner learns that thereafter, the first respondent and her manager Venkatarama Naidu told Veerabadran Pillai that unless he along with the petitioner executed a sale deed of the under-mentioned house to the 1st respondent for Rs.8,000 he would be prosecuted and sent to jail for criminal doshonest misappropriation to the extent of Rs.25,000." In paragraph 8 it is stated thus - "Venkatrama Naidu (D.W.4) also threatened them that if the petitioner plaintiff did not put her signature to that document, she would also be arrested and sent to jail."

Thus, the learned Judge's statement that for the first time P.W.1 stated in her evidence that D.W.4 threatened that she as well as her husband would be sent to jail is not correct. So too, the other

criticism that there is discrepancy between the evidence of P.W.2 and P.W.3 can hardly be accepted on the material in this case. It is relevant to notice that P.W.2 is an attestor to Exhibit B-2. It is equally relevant to notice that a fair reading of his evidence will disclose that he was not present right 'through the transactions resulting in the execution of Ex.B-2. He did say as follows:

> P. W. 1 போட மாட்டேன் என்று தகராறு பண்ணினான். போடாது போனால் கிரிமினல் கேஸ் ஆகும் என்று மானேஜர் சொன்னார். அவர் புருஷனும வற்புறுத்தி போடச் சொன்னார். அநத பத்திரத்தை வாசித்து காட்டவில்லை.

The reference to criminal case is comprehensive enough to take into its fold that threat of P.W.1 and P.W.4 being sent to jail. It is very important to notice that this statement of P.W.2 was not challenged in the cross-examination. Turning to the evidence of P.W.3, it will be seen that this witness also was not present right through the transaction. P.W.3 in chief examination had deposed as follows:

> விபரம் ஒன்றும் சொல்லாமல் கையெழுத்து போடச சொன்னார்கள். P. W. 1 மறுத்து அழுதாள். மானேஜர் வெங்கட்ராம நாயுடு P. W. 1ன் புருஷனை ஜெயிலுக்கு அனுப்பி விடுவேன் என்றார். மறுக்க முடியாமல் கையெழுத்து போட்டார்.

We fail to understand as to how there is any inconsistency between the evidence of P.W.2 and P.W.3 with regard to the threat extended to P.W.1. It is needless to state that the evidence of a witness should be read as a whole and a comparison is made with that of the testimony of another witness. It is rather hazardous to expect that the corroboration by one witness should be in identical terms with the testimony of another witness. The reasonable course is to read the evidence of all the witnesses as a whole and to find out whether on the material aspect which alone will have an impact on the issue concerned there was corroboration. On the evidence in this case we reiterate that the evidence of P.W.1 finds corroboration not only from P.W.2, but also from P.W.3; we exclude from our consideration the evidence of P.W.4 who is after all P.W.1's husband and also P.W.5 and P.W.6 for the present.

27. We will not demonstrate as to how the evidence of P.W.5 and P.W.6 is of assistance to the appellant though according to the learned Judge of this Court it was otherwise. It is seen from the testimony of P.W.5 that he was not present at the time when P.W.6 signed Ex.B-6. At the same time his evidence is that the moment P.W.1 refused to sign he left the place. Thus this witness has spoken to the incident that had taken place as long as he was present. Even that evidence is to the effect that P.W.1 refused to sign Exhibit B-2. This evidence is sufficient to sustain an inference that she was not prepared to execute the document voluntarily. Turning to P.W.6 the important feature worthwhile noticing is that he is an independent and disinterested witness: he owns a soda factory. This witness has been categorical in his statement that only after D.W.4 threatened P.W.1 and P.W.4 to send them to jail unless she (P.W.1) signed the document, did P.W.1 sign it. Nothing was suggested to this witness during the course of cross-examination to discredit his testimony. The only suggestion put to him in the course of cross-examination was that at the instance of P.W.1 he was deposing falsely. It is pertinent to note that this witness has also spoken to the fact that Exhibit B-2 was not read over, that P.W.1 was somewhere in the interior portion of her house and that after the Manager (D.W.4) sent for her, she came to the front portion of the house. Nonetheless the learned Judge has stated that the evidence of P.W.6 is not of much assistance. Thus it turns out that the rejection of the evidence of P.Ws.2, 5 and 6 in any event is not proper.

28. Now let us examine the evidence adduced on behalf of the first respondent. We had already dealt with the evidence of D.W.6, the alienee's father. So far as D.W.5 (first respondent) is concerned, it is very significant to notice that she made no reference to P.W.1. Also in Ex.A-40 which is the reply notice sent at the instance of the first respondent, there is no reference that instructions for the notice were conveyed by the first respondent through her manager D.W.4. On the other hand, a reading of Ex.A-40 will reveal that the first respondent herself

had personally given instructions for the said reply. In the reply notice it is alleged that, P.W.1 was aware of her husband having misappropriated Rs.25,000, that the first respondent came to know about the same, the matter was discussed in the presence of P.W.1. P.W.4 and certain other persons who were interested in them. This, according to the averment suggests that there must have been a discussion between the first respondent on the one hand and the appellant, her husband and others on the other. But this vital aspect is not spoken to by D.W.5 herself in her evidence. We have just now referred to the fact that D.W.5 made no reference to P.W.1. On the other hand, a reading of her evidence as a whole would show that she had met P.W.4 only and all the transactions were dealt with by her with P.W.4. The second crucial aspect to be noticed is that in Ex.A-40 it is stated that out of the funds misappropriated, the suit house was improved and that P.W.4 purchased jewels for P.W.1, and that because of the same, P.W.1 voluntarily agreed to make good the amount misappropriated by her husband. Again this material aspect was not spoken to by D.W.5 in the witness box. It will be further seen that the above stand taken by the defence will go a long way to give a death blow to the respondent's case. According to the averments in Exhibit A-40, P.W.1 volunteered to make good the amount to the first respondent because out of the misappropriated amount the house was improved and jewels were purchased. This will repel the theory of reparation that is said to have worked in the mind of P.W.1. The above averments only exhibit the first respondent's anxiety to justify Ex.B-6 as a fair deal by some means or other. As already pointed out not only did D.W.5 fail to refer to this vital aspect but also was this case not put to P.W.1. The documentary evidence, which we will be referring to presently, will destroy the above theory trotted out by the first respondent in her reply Ex.A-40. It is seen from the evidence of D.W.4 and Ex.B-7 that the amounts said to have been misappropriated must be between 1st April, 1965 and 30th June, 1965. A reference to Ex.A-20 which is the plan submitted by the appellant for improvement is dated 2nd July, 1956, and from this it is obvious that improvements should have been made somewhere in 1965. Thus it is conclusively established that the amount which is said to have been misappropriated in 1965 could not have been utilised for improving the suit house. It is further interesting to note that D.W.4 would excel his master D.W.5 as to how the alleged misappropriation amount was utilised by P.W.5. Even in the chief examination he had deposed:

> *கம்பெனியிலுள்ள பணத்தை எடுத்து* **P.W. 1** *பேரில் சொத்து வாங்கியிருநததால் என்று* **P.W. 1** *இடமும்* **Ex. B-1** *எழுதி வாங்கினோம்.*

That this is a new invention by D.W.4, is beyond doubt. For, it is neither alleged in Ex.A-40 nor in the written statement nor did D.W.5 speak to this aspect. At any rate that the said statement is wholly false is obvious from the fact that the amount was misappropriated somewhere in 1965 while the suit house was purchased under Exs.A-2 and A-3 as early as in 1950. How then are we to trust either D.W.4 or D.W.5? It is seen from the evidence of D.W.5 that she was not personally aware of the alleged misappropriation. According to her, it is D.W.4 who told her that P.W.4 had misappropriated. Now if we turn to the testimony of D.W.4 we will find that it is too difficult to act on his testimony. We have just now pointed out as to how his evidence is unworthy of acceptance. It is rather surprising that D.W.1, who is an employee under D.W.5 drawing a salary of Rs.500 was able to amass much fortune as conceded by him in the course of cross-examination. The evidence recorded on 16th September, 1971 shows that besides several investments in the name of his daughter and his wife he is owning a bus and bungalow in the city of Madras opposite to Grama Vidyodaya. According to him he purchased the bungalow for Rs.49,000 and the bus for Rs.35,000. Besides he owns a house in Chittoor. Further he owns a lorry since 1965. He is now an income-tax assessee. We would also like to point out that his evidence as regards the alleged agreement between him and P.W.1 whereby P.W.1 agreed to execute the sale deed is but false. Above all, P.W.5 admitted that P.W.4 was in her service for 18 years and till the

alleged misappropriation she had no complaint whatever to make against P.W.4. He had further referred to the fact that it is D.W.4 who negotiated and finalised the sale under Ex.B-35 to the second respondent. It is, therefore that we characterised him as an archvillain. Therefore, we do not hesitate to reject the testimony of D.W.4 as unworthy of credence. D.W.1 is also one of the attestors to Ex.B-2. His testimony is that at about 4.30 p.m. on the date of execution, P.W.4 and D.W.4 took him to the house. He could remember the document having been read over, that when he signed P.W.3 had already signed as a witness and that he did not know others who had signed. He would say in chief examination that P.W.4 telephoned to him at about 11 a.m. on that day and asked him to go over to Gingee to collect the lorry dues due to him. He would also add that when he asked about P.W.4 and D.W.4 about the lorry matter, he was informed that it would be settled in about a week after selling the lorry to another person. It is rather difficult to accept his evidence because it was suggested to P.W.4 that he never phoned to D.W.1 on that day representing that he was having the cash ready to discharge the lorry dues and because it is highly improbable that P.W.4 would have phoned like that when, in fact, the lorry was not sold by them and he had no funds either.

29. D.W.2 has not spoken to about Ex.B-2. Therefore, his evidence will be of no use to the defence.

30. D.W.3 is the scribe but he is still working under the first respondent. It is not elicited from him that he is a document writer or well versed with such talents. Further, D.W.4 would state that Sarangapani used to write documents. Why Srinivasan was chosen for Ex.B-6 remains unexplained. The probability is that D.W.4 would not like more persons to be brought into the scene. Even according to D.W.3 he only acted under instructions of D.W.4 but not under instructions of the first respondent. While D.W.3 would state that the draft prepared by him was destroyed by him after Ex.B-2 was prepared, the evidence of P.W.4 is that the draft is not with him. A reference to Ex.B-2 shows that a sum of Rs.3,247-49 was undertaken to be paid by the first respondent purchaser to the appellant's mortgagee, namely, Tindivanam Co-operative House Mortgage Bank. Both D.W.3 and D.W.4 would assert that the details were furnished by P.W.4. The description of the property in Ex.B-2 refers to 4 boundaries, the measurements, municipal door Number, ward number and survey numbers. These particulars, as already stated, were furnished by P.W.4 from memory. The suggestion put at the instance of the appellant is that they got the particulars from the mortgagee bank and P.W.4 could not have given such particulars from memory. We prefer the stand taken by the appellant to the evidence of P.W.4 and D.W.4 because it is too difficult to believe that P.W.4 was able to carry all particulars in his memory and also the figure due to the co-operative bank to the last pie. Thus, in our view, the evidence of D.W.4 is not only interested but is equally unsatisfactory to commend acceptance. We had already discussed the evidence of D.W.4 and D.W.5. Thus, a fair assessment of the evidence of D.Ws.1 to 5 would go to show that there is no consistency in the defence on vital matters such as whether P.W.4 is the real owner and P.W.1 is the ostensible owner of the suit property and what really persuaded P.W.1 to convey her property for her husband's alleged defalcation. In short, the evidence of D.Ws. do not carry conviction to us.

31. The consequence is that the appellant's case appears to be nearer the truth. There are also additional circumstances which would fortify our conclusion. When Ex.B-2 came to be executed on 17th July, 1965 it was registered only on 20th July, 1965 while Ex.A-34 was registered on 20th April, 1966. Secondly, the first respondent would expect the court to believe that notwithstanding no threat of prosecution or other criminal proceedings against P.W.1, both P.W.1 and P.W.4 volunteered to execute Exs.B-6 and B-1 and that P.W.4 voluntarily sold his lorry to discharge the balance due in respect of his embezzlement. It is interesting to note that even the learned Judge of this Court had observed that "he (D.W.4) would have made

it clear that P.W.4 might have (sic) been handed over to the police for prosecution with regard to the misappropriation and the only way of avoiding that was by making good the amount misappropriated and naturally P.W.4 would have offered to make good the amount by executing the sale of the house as well as the sale of the lorry and executing the bond for the balance." We will have to reiterate that that would have been the natural and ordinary course of events if really it was found out by D.W.4 and was made known to D.W.5 that P.W.4 had misappropriated to the tune of Rs.25,000. Yet the defence would not fairly accept that stand. In our opinion it is not unlikely that D.W.4 and D.W.5 are not prepared to concede the factual position lest it should be complained that Ex.B-2 would offend section 23 of the Contract Act, or might support the appellant's case of undue influence and coercion. How are we then to accept the defence when it turns out that they had suppressed deliberately certain events that had really taken place? We had already pointed out that all the possessions of P.W.1 and P.W.4 were stripped off in the process of alleged reparation. P.W.1 was asked to sell the house, P.W.4 was asked to dispose of his lorry, the insurance amount in respect of that lorry was also appropriated by the first respondent through D.W.4 and for the balance due Ex.B-1 was taken from P.W.1 and P.W.4. It is very hard to believe that all these transactions were volunteered by P.W.1 and P.W.4. P.W.1 had a big family to be maintained and unless there had been a pressure brought to bear on P.W.1, she would not have voluntarily parted with her only property. P.W.1's case is that both her husband and D.W.4 were in a position to dominate her will and used that position to obtain an unfair advantage over her by taking Ex.B-2. She said also her husband was threatened to be put behind the bars. The evidence of P.W.1 that she is an illiterate and could only sign her name is not challenged in the course of the cross-examination. So too she had spoken that the contents of Ex.B-6 were read over to her. There is also ample evidence that she first refused to sign but only after the threat by D.W.4 did she execute Ex.B-2. When she stated in re-examination that the property was worth Rs.15,000 in 1965 and though there was subsequent cross-examination her statement about valuation was not challenged. It may be interesting to notice at this stage, the testimony of D.W.5. According to her she did not ascertain the value of the suit property. Even D.W.4 had simply stated. "வீடு ருபாய் 8000/- என்று முடிவானது" What is its market value is not spoken to by D.W.4. The facts which fell for consideration by the Privy Council in *Tungabai v. Yeshwant Jag*, L.R. (1944) 71 I.A.184= A.I.R.1945 P.C.8= 57 L.W.605= (1944)2 M.L.J.350 (P.C.), are on all fours, are identical to the facts in the present case save the difference that in that case the wife was found to be submissive while in the instant case there is definite evidence that the wife was coerced to execute Ex.B-2 under threat of being arrested. It is fairly established from the evidence in this case, that on the one side P.W.4 was urging P.W.1 to execute Ex.B-2 taking advantage of his status as her husband. In other words P.W.4 had the real authority over her to induce P.W.1 to execute Ex.B-2, while on the other hand under threat of sending her to jail D.W.4 had apparent authority over P.W.1. But for such authority being exercised both by P.W.4 and D.W.4. P.W.1 would not have voluntarily executed Exhibit B-2. From our assessment of the evidence we have no hesitation to conclude that the transaction is unconscionable. If P.W.1 was asked to forego her property for the sake of her husband and if in consideration therefor, the husband was once and for all relieved from the predicament in which he was placed by virtue of the alleged defalcation it is possible to contend that the transaction B-2 is not unconscionable. But in this case it is admitted that P.W.1 was not only called upon to forego her property but also to execute Ex.B-1 promissory note for the balance. In addition thereto, P.W.4's lorry was sold. These circumstances will go a long way to suggest strongly that all these transactions are but unconscionable. We may add that D.W.4 had only acted as D.W.5's agent in all these transactions and therefore, the first respondent cannot escape from the undue influence practised by D.W.4 on P.W.1. From the foregoing assessment,

we find that the appellant had succeeded in establishing that P.W.4 and D.W.4 were not only in a position to dominate her will but also brought about Ex.B-2 transaction which both on the evidence and on the face of it not only appeared to be unconscionable but was actually proved to be so. In other words, the first respondent did not discharge the onus that was on her by virtue of section 16(3) but also miserably failed to adduce evidence to rebut such a statutory presumption.

32. The only other point to be adverted to is the issue whether the appellant could be held liable under Ex.B-1 promissory note. Ex.B-1 is admittedly executed for the balance due in respect of Rs.24,838-74 said to have been misappropriated by P.W.4. It is signed not only by P.W.4 but also by P.W.1. When Ex.B-2 was found to be voidable because of undue influence and coercion brought to bear on P.W.1 by P.W.4 and D.W.4 it would automatically follow that Ex.B-1 cannot be enforced as against P.W.1. Further, so far as P.W.1, is concerned, Ex.B-1 is not supported by consideration. Both P.W.1 and P.W.4 would depose that at the time they signed on the stamp in Ex.B-1 it was blank. P.W.4 also added that had he known that it was a promissory note, he would not have subscribed his signature to it. It is attested by P.W.3 and D.W.2. P.W3 also stated that at the time he signed as a witness the contents therein were not written. For the reasons already stated, we do hold that Ex.B-1 was not executed by P.W.1 voluntarily. If so, she cannot be held liable under Ex.B-1.

33. The result is that these appeals succeed; the judgment and decree of the learned single Judge are set aside and those of the trial Court restored only as regards the appellant with costs here and in A.S.No.843 of 1971. Advocate's fee one set.

The Judgment of the Bench was delivered by

Shanmukham, J.:-At the time when the judgment was rendered, we had not provided for any directions as regards payment of court-fee, since the appeals have been presented by the appellant as an indigent person. The appellant has succeeded in the appeals. Accordingly, we direct the legal representatives of the first respondent in these appeals to pay the court-fee due to Government in the L.P.Appeals.

B.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.4442 of 1983.

28*th August*, 1984.

Arul Theatre rep., by Lakshmiammal and others *Petitioners**

v.

The Regional Director Employees State Insurance Corporation, Madras *Respondent.*

(A) Employees' State Insurance Act (34 of 1948), sections 78 and 96(6) and Rule 47 - Scope and applicability - Procedure to be followed.

(B) Civil Procedure Code (5 of 1908), Order XXII, rule 3 and section 151.

(C) Limitation Act (36 of 1963), Article 120 and sections 3 and 5.

Section 78 of the Employees' State Insurance Act enumerates only some of the powers of the civil court and that is confined to the summoning and enforcing the attendance of witnesses and compelling the discovery as well as the production of the documents, but that is by no means exhaustive. With reference to the procedure

to be followed before the courts, section 96(b) of the Employees' State Insurance Act enables the State Government to make rules. Pursuant to that, in G.O.Ms.No.3143, Development, dated 9.7.1951, rules have been framed. *[Para.3]*

On the question whether to proceedings initiated under the Employees' State Insurance Act, the provisions of the Civil Procedure Code will be inapplicable,

Held: In view of Rule 47, framed by the Tamil Nadu Government in exercise of powers under section 90 of the Employees' State Insurance Act, it is obvious that Order XXII, rule 3 and Article 120 of the Limitation Act would stnad attracted and that would mean that an application to bring on record the legal representatives of a deceased party has to be made within 90 days from the date of the death. In this case the provisions of Order XXII, rule 3, and section 151, Civil Procedure Code are invoked. 'M' died on 28.12.81 and the application to bring on record the legal representatives had been made only on 16.2.83. There was no application even before the Court below for condoning the delay in filing the application beyond 90 days. Under those circumstances, the Court below was in order in having rejected the application filed by the petitioners as barred by time in accordance with section 3 of the Limitation Act. *[Para.3]*

Petition under section 115 of Act 5 of 1908 praying the High Court to revise the order of the District Court, Coimbatore dt. 15.7.83 and passed in I.A.No.371/83 in Pro.No.15/81.

Mr.T.D.Vasu, for Petitioners.

Miss. Radha Srinivasan, for Respondents.

The Court made the following

ORDER: This Civil Revision Petition is directed against the order of the learned District Judge, Coimbatore, in I.A.No.371/83 in Pro.No.15/81 on his file. The main proceeding was initiated by one Arul Theatre represented by one Muthu for a declaration that Arul Theatre is not an establishment coming within the purview of the notification in G.O.Ms.No.1088, dt. 22.1.1976. During the pendency of that proceeding, Muthu died on 28.12.1981. The petitioners, who are the wife and children of the deceased Muthu, filed I.A.No.371 of 1983 on 15.2.1983 under Order XXII, rule 3, and section 151, C.P.C. praying that they should be impleaded as the legal representatives of deceased Muthu in the proceeding. That application was opposed by the respondent herein on the ground that not even the date of death of Muthu had been disclosed and that having regard to his death which took place on 28.12.1981, the application to bring on record the legal representatives filed on 16.2.1983 was barred. The learned District Judge upheld this objection of the respondent and dismissed the application to bring on record the petitioners as the legal representatives of the deceased Muthu, as barred by time. It is the correctness of this order that is challenged in this Civil Revision Petition.

2. The contention of the learned Counsel for the petitioners is that to the proceedings initiated under the Employees' State Insurance Act, 1948 (34 of 1948), the provisions of the Code of Civil Procedure would be inapplicable and therefore, the application to bring on record the petitioners as the legal representatives of the deceased Muthu filed on 16.2.1983, can be entertained and ordered as well. On the other hand, the learned Counsel for the respondent drew attention to rule 47 framed by the Tamil Nadu Government in the exercise of powers under section 96 to the effect that with reference to matters relating to procedure for which no specific provision is made, the provisions of the Code of Civil Procedure would apply so far as may be and Order 22, rule 3, C.P.C. and Article 120 of the Limitation Act would apply and therefore, any application made to bring on record the legal representatives of the deceased party beyond 90 days from the date of the death of the party, would be barred.

3. Section 78 of the Employees' State Insurance Act enumerates only some of the powers of the Civil Court and that is confined to the summoning and enforcing the attendance of witnesses and compelling

the discovery as well as the production of the documents, but that is by no means exhaustive. With reference to the procedure to be followed before the Courts, section 96(b) of the Employees' State Insurance Act enables the State Government to make rules. Pursuant to that in G.O.Ms.No.3143, Development, dt. 9.7.1951, rules have been framed and rule 47 which is relevant for this case runs as under:

> "In respect of matters relating to procedure or admission of evidence for which no specific provision is made in these rules, the provisions of the Code of Civil Procedure, 1908 (V of 1908) including the rules thereunder and the Indian Evidence Act, 1872 (I of 1872), shall, so far as may be, apply to proceedings under the Act."

In view of rule 47 it is obvious that Order XXII, rule 3 and Article 120 of the Limitation Act would stand attracted and that would mean that an application to bring on record the legal representatives of the deceased party has to be made within 90 days from the date of the death. Indeed, it is seen that the petitioner themselves invoked Order XXII, rule 3, and section 151, C.P.C. In this case, Muthu died on 28.12.81 and the application to bring on record the legal representatives had been made only on 16.2.83. There was no application even before the Court below for condoning the delay in filing the application beyond 90 days. Under those circumstances, the Court below was in order in having rejected the application filed by the petitioners as barred by time in accordance with section 3 of the Limitation Act. There is no illegality or irregularity in the order of the Court below which merits interference. The Civil Revision Petition is therefore, dismissed with costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*C.R.P.No. 89 of 1983. 21st March, 1985.

Subba Naicker *Petitioner**

v.

Durai Raj *Respondent.*

Civil Procedure Code (5 of 1908), Order 21, rule 64 - Sale beyond the decretal amount mentioned in the sale proclamation not allowed.

In this case, several items were brought to sale, in execution of the decree. The execution itself was for Rs.7,126/-. It would be sufficient if item No.3 was first sold and in case it was found that the sale did not fetch a price sufficient to cover the decree amount mentioned in the proclamation of sale, the Court can then auction item No.2. If again the sale proceeds are not sufficient to satisfy the decree then sale of item No.1 can be proceeded with. If a sale of all the items was held that would cause considerable prejudice to the judgment-debtor. As the Court had not applied the provisions of Order 21, rule 64, C.P.C.which goes to the root of the matter of jurisdiction, the High Court has necessarily to interfere with the order passed by it. On that view, the Civil Revision Petition is allowed and the matter is remitted to the court below.

[Para.3]

Case referred to:-

L.P.S.Reddy v. Padmavathamma, (1977)2 An.W.R. (S.C.) 51= (1977)2 S.C.J.293= (1977)3 S.C.C.337= (1977)3 S.C.R.692= A.I.R.1977 S.C.1789.

Petition under Section 115 of Act 5 of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Manamadurai dated 30.11.1982 and made in E.P. No.103 of 1982 in O.S.No.130 of 1973.

N.Venkataswami, for Petitioner.

M.Velusamy, for Respondent.

The Court made the following

ORDER:- This revision is directed against the order of the learned District Munsif, Manamadurai, passed on 30.11.1982 allowing the execution to proceed and fixing a date for proclamation and sale. The respondent obtained a decree in O.S.No.130 of 1973 on the file of the District Munsif, Manamadurai, against the revision petitioner for Rs.3,500/-. E.P.No.103 of 1982 was filed by the decree-holder to realise the amount of Rs.7,126-15. The decree-holder attached three items of properties worth about more than a lakh. The trial court ordered sale of the property notwithstanding the fact that it was brought to the notice of the court that for a decree debt of Rs.7,000/- and odd, properties worth several lakhs cannot be brought to sale.

2. From the records it is seen that the judgment-debtor, namely, the revision petitioner has valued first item at Rs. 20,000/-, the second item at Rs.4,500/- and the third item at Rs.3,500/-. The value given by the revision petitioner-judgment-debtor is mentioned in the sale proclamation. The Amin has also valued items 1, 2 and 3 at Rs.66,800/-, Rs.28,000/- and Rs.22,800/- respectively.

3. The contention of the learned counsel appearing for the petitioner is that the learned District Munsif has not followed the provisions of Order 21, rule 64, Civil Procedure Code, and there is therefore excessive execution. Even at the outset, I must point out that no application for proceeding under Order 21, rule 64, Civil Procedure Code, was filed before the trial Court. It is not disputed that the properties in question were attached. As the properties attached are separate items, the court, in my view, cannot sell more than such portion as may be necessary to satisfy the decree. The Supreme Court in *L.P.S. Reddy v. Padmavathamma*, (1977)2 An.W.R. (S.C.) 51= (1977)2 S.C.J.293= (1977)3 S.C.C.337= (1977)3 S.C.R.692= A.I.R.1977 S.C.1789 while dealing with the words "necessary to satisfy the decree" occurring in Order 21, rule 64, Civil Procedure Code, observes that those words clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation and that where a sale fetches a price equal or higher than the amount mentioned the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at that stage. In this case, several items are brought to sale, in execution of the decree. The execution itself was for Rs.7,126. It would therefore be sufficient if item No.3 is first sold and that if it is found that the sale does not fetch a price sufficient to cover the decree amount mentioned in the proclamation of sale, the court can then auction item No.2. If again the sale proceeds are not sufficient to satisfy the decree, then sale of item No.1 can be proceeded with. If a sale of all items is held that would cause considerable prejudice to the judgment-debtor. As the Court has not applied the provisions of Order 21, rule 64, Civil Procedure Code, which goes to the root of the matter of jurisdiction, this court has necessarily to interfere with the order passed by it. On that view, the Civil Revision Petition is allowed and the order is set aside and the matter is remitted to the Court below. The court will order proclamation and sale of item No.3, first and if it is found that the sale proceeds are not sufficient to satisfy the decree amount, then the sale of other items may be ordered. There will be no order as to costs.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R. Gokulakrishnan and S. Nainar Sundaram, JJ.*

*Writ Appeal No.921 of 1983.
12th *April*, 1984.

The Coimbatore Periar Mavatta Dravida Panchalai Thozhilalar Munnetra Sangam (P.F.) represented by its General Secretary, Coimbatore and others *Appellants**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Labour and Employment Department, Fort St. George, Madras and others *Respondents.*

(A) Industrial Disputes Act (14 of 1947), section 10(1)(d) - Question of payment of bonus on a formula different from the one under Act - Can be referred for adjudication.

"Industrial dispute" means any dispute or difference between employers and employees, or between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. Section 12 of the Industrial Disputes Act is invoked where there is an industrial dispute whether it exists actually or is apprehended. It is for the subjective satisfaction of the appropriate Government for referring the matter to the Industrial Tribunal. *[Para.8]*

In the present case, the workers wanted additional bonus and the conciliation effected therefor failed. The argument that the workmen's right to agitate, strike and somehow make the management to pay the additional bonus, is being curtailed by the reference made by the Government to the Industrial Tribunal cannot be countenanced. The Government has correctly referred the matter to the Industrial Tribunal for adjudication and it is open to the workmen to agitate and assert their right to get additional bonus either under the Act of under the Payment of Bonus Act. *[Para.9]*

(B) Industrail Disputes Act (14 of 1947), section 32(5) - Reference to a Board (Labour Court, Tribunal, or National Tribunal) - Matters entirely for the Government to decide - Courts cannot interfere.

If the dispute was an industrial dispute as defined in the Act, its factual existence and expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because in its opinion, there was no material before the Government on which it could have come to an afirmative conclusion of these matters. The Tribunal or Court cannot sit in appeal over the decision of the Government come to a conclusion that there was no material before the Government. *[Para.8]*

Cases referred to:-

State of Bihar v. D.N.Gunguly, (1959)1 M.L.J. (S.C.) 178= (1959)1 An.W.R. (S.C.) 178= (1959) M.L.J. (Crl) 323= 1959 S.C.J. 533= 1959 S.C.R.1191= A.I.R.1958 S.C. 1018; *Shambu Nath Goyal v. Bank of Baroda*, (1978)2 S.C.J.175= (1978)2 S.C.R. 793= A.I.R.1978 S.C.1088.

Appeal under Clause 15 of the Letters Patent against the Order of Mr.Justice Mohan dated 12.8.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 10445 of 1982 presented under Article 226 of the Constitution of India to issue a writ of *Certiorari* calling for the concerned records from the first respondent therein relating to G.O.Ms.No.2383, Labour and Employment Department, dated 9.11.1982 and quash the reference dated 9.11.1982.

The Order of the Court was made by

Gokulakrishnan, J.:- The petitioners in W.P.No.10445 of 1982 are the appellants herein. W.P.No.10445 of 1982 was filed for issue of a Writ of *Certiorari* quashing the reference made by the Government in G.O.Ms.No.2383, Labour and Employment

Department dated 9th November, 1982. The said G.O. was passed by the Government in respect of the dispute regarding bonus between the appellants and respondents 2 to 6, for adjudication by the Industrial Tribunal under section 10(1)(d) of the Industrial Disputes Act, 1947 (hereinafter referred to in this judgment as the Act). The affidavit in the main writ petition was filed by the General Secretary of the Coimbatore Periyar Mavatta Dravida Thozhilalar Munnetra Sangam, on behalf of the appellants, *inter alia* alleging that bonus was paid to the workers according to "Sima Formula", that this formula was improved upon in favour of the workers with every settlement since the bonus settlement for 1968-69, that the last such settlement was signed under section 18(1) of the Act, that bonus was being paid according to the settlement every year and that for the year 1981-82, the respondents stated that they would pay bonus for that year only on the basis of the bonus formula given under the Act and not as per the formula agreed upon under the settlement dated 12.10.1979. The appellants, therefore, issued a strike notice under section 22 of the Act proposing to go on strike from 11.11.1982 if the management did not come to terms on the bonus dispute for 1981-82. The intervention of the Minister for Labour, according to the appellants, was only an eye-wash and even the conciliation proceedings started by the Joint Commissioner of Labour at Madras on 2nd, 3rd, 8th and 9th November, 1982, were not genuine conciliation proceedings as the hands of the Joint Commissioner of Labour were practically tied and that was only an empty formality to comply with the requirement of the Act. It is further contended by the appellants that on 9.11.1982 the appellants were sent for to the residence of the Minister of Labour, that the Minister read out the orders of the Government banning the textile strike under section 10-B of the Act and that the impugned order referring the bonus dispute for 1981-82 to the Industrial Tribunal for adjudication was issued. According to the appellants, the respondents have made up their mind to refer the matter to the Industrial Tribunal and that they had not applied their mind to the question whether the dispute is capable of reference under the Act and the Bonus Act. The appellants have further contended that the question of the payment of bonus on a formula different from the one under the Act cannot be the subject-matter of reference under the Act and that under section 34 of the Bonus Act, parties can enter into an agreement for bonus under a formula different from the one under the Bonus Act. It is further contended that the respondents are bound by the settlement dated 12.10.1979, that until further settlement is reached, the "Sima formula" and the settlement entered into on 12.10.1979 must be in force, that since notice under section 19 of the Act terminating the formula set out in the 12.10.1979 settlement and notice under section 9 of the Act proposing to have a formula different from the one under the settlement, were not given, the reference made is without jurisdiction. With the abovesaid allegations, appellants prayed for the relief aforesaid.

2. The respondents have, *inter alia* mainly contended that it is not necessary to terminate the settlement dated 12.10.1979, that it is not necessary to give notice either under section 19 or under section 9-A of the Act, that inasmuch as sub-para. (b) to section 34 of the Act is no longer in force, there cannot be any private agreement except the one falling under section 31-A of the Act and that section 10 of the Act is wide enough for making a reference of the dispute for adjudication as rightly done by the Government in this case.

3. The fourth respondent, i.e. the Chairman-cum-Managing Director of National Textile Corporation, Coimbatore, has *inter alia* contended in his counter-affidavit that the law relating to the payment of bonus being codified and the management having made their position clear, there was nothing further to settle. In such circumstances, the strike notice issued by the Unions was totally lacking in *bona fides* and it was not intended to advance the case of the workmen but it was only to pressurise the managements to pay over and above the statutory liability. It was further contended by the fourth respondent that the real dispute between

the managements and the workers is in respect of the claim for additional payment over and above what is lawfully due as per the 1965 Act. The fourth respondent would assert that the matter has rightly been referred to the Industrial Tribunal for adjudication.

4. We do not think it necessary to set out the various other contentions put forth by the respondents in the writ petition.

5. The learned single Judge of this Court after adverting to the impugned order and also the relevant provisions of the Act and the Bonus Act, passed an order dismissing the writ petition. It is against the dismissal of the writ petition, the present writ appeal has been preferred.

6. Mr.N.G.R.Prasad, learned Counsel for the appellants contended that the reference to the Industrial Tribunal is a futile one since the Labour Court cannot grant anything outside the Bonus Act and that such a reference has been made only to prevent the strike, which is the lawful weapon at the hands of the workmen. On the other hand, Mr.M.R.Narayanaswami, learned Counsel appearing for the various managements contended that the dispute is in respect of payment of bonus, to which the management did not accede and hence, necessarily the matter was referred to the Industrial Tribunal. It is further contended by Mr.M.R.Narayanaswami, that it is the union which raised an impossible demand for payment of bonus, that the attempted conciliation failed and that ultimately, the matter has been referred to the Industrial Tribunal. To the very same effect the learned Government Advocate also put forth his contentions.

7. The demand of the workers is to get additional amount apart from the bouns paid as was paid for three years preceding 1981-82. The management did not agree for paying the additional amount apart from the bonus and it reiterated that the quantum of bonus should be fixed in accordance with the payment of Bonus Act, 1965 and that no additional payment could be considered. The conciliation talk failed and as such, the Government, in exercise of the power conferred on it under section 10(1)(d) of the Act, referred the dispute for adjudication, to the Industrial Tribunal, Madras. Questioning the said reference, the workers filed the writ petition. As stated supra, the learned single Judge dismissed that writ petition against which the present writ appeal has been filed.

8. Mr.N.G.R.Prasad attacks the reference mainly on the ground that it will deprive the worker's right to strike in order to force the management to make the additional payment apart from the bonus. No doubt, strike is a recognised mode of agitation to press home the demands of the workers. But, nowhere it is stated that such a strike can be resorted to, to pressurise the management to accede to the payment of additional amount to the workers apart from the bonus, under the Payment of Bonus Act. In this case, the Government after referring the matter to the Industrial Tribunal, also passed orders under section 10(b) of the Act giving reliefs to the workmen pending adjudication. The actual reference reads as follows:

> "Whether the demand of the workers for payment of bonus and additional payment for the year 1981-82, in accordance with the principles adopted in the settlement dated 12.10.1979 under section 18(1) of the Industrial Tribunal Act, 1947, entered into between the workmen and the managements of certain textile mills represented by the Southern India Mills' Association at Coimbatore is justified; if not, the relief to which the workmen are entitled."

Section 2(k) of the Act defines 'industrial dispute.' It means, 'any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person,

Section 12 of the Act deals with the duties of the conciliation officer and this section is invoked when there is an industrial dispute, whether it exists actually or is

apprehended. Section 12(5) of the Act is mandatory in nature and it reads as follows

"12(5), on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board (Labour Court, Tribunal or National Tribunal), it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor."

It is for the subjective satisfaction of the appropriate Government for referring the matter to the Industrial Tribunal. Even in respect of an apprehended dispute, such reference can be made. Such propositions have been very well laid down in *State of Bihar v. D.N.Ganguly*, (1959)1 M.L.J. (S.C.) 178= (1959)1 An.W.R. (S.C.) 178= (1959) M.L.J. (Crl.) 323= 1959 S.C.J.533= 1959 S.C.R.1191= A.I.R.1958 S.C.1018 and *Shambu Nath Coyal v. Bank of Baroda*, (1978)2 S.C.J.175= (1978)2 S.C.R.793= A.I.R.1978 S.C.1088. In the latter decision it has been clearly held that if the dispute was an industrial dispute as defined in the Act, its factual existence and expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because on its opinion there was no material before the Government on which it could have come to an affirmative conclusion of those matters. It has been further held by the Supreme Court in that case that the Tribunal or Court cannot sit in appeal over the decision of the Government and come to a conclusion that there was no material before the Government.

9. As far as the present case is concerned, the workers definitely want additional bonus and the conciliation effected therefor failed. The argument of Mr.N.G.R.Prasad, suggesting that the workmen's right to agitate, strike and somehow make the management to pay the additional bonus, is being curtailed by the reference made by the Government to the Industrial Tribunal, cannot be countenanced. We respect the rule of law. If reference has been made as per law and if it is found that there is a dispute which has not been resolved, the correct procedure is to refer the matter to the Industrial Tribunal for adjudication. Correctly, the Government has referred the matter to the Industrial Tribunal and it is open to the workmen to agitate and assert their right to get additional bonus either under the Act or under the Payment of Bonus Act but the workmen cannot pressurise the management by strike to pay additional bonus, which has to be settled by adjudication. The mere fact that the law is viewed by the workmen otherwise, cannot, in our opinion, give a right to the workmen to resort to strike in order to pressurise the management to accede to the demand of the workmen, which they cannot get lawfully. In the present case, it is always open to the workmen to come to an understanding even before the Industrial Tribunal as regards the payment of additional bonus even though the conciliation effected before reference has failed. As it is, we do not find any merit in the present writ appeal and we are in complete agreement with the reasonings of the learned single Judge of this Court who dismissed the writ petition filed by the workmen.

10. For all these reasons, the Writ Appeal is dismissed. There will be no order as to costs.

B.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S. Nainar Sundaram, J.*

*C.R.P.No.3322 of 1983.
14th December, 1984.

Palaniammal and others *Petitioners**

v.

Pavayammal and others *Respondents.*

Civil Procedure Code (5 of 1908), Order 21, rules 1(1)(b), 2(2) - Joint decree without shares of the respective decree-holders being apparent on the face of the decree - Payment of a sum to two of them - Effect - No payment could be countenanced individually against one or the other of the joint decree-holders.

On the question whether in the case of a joint decree without the shares of the respective decreeholders being apparent on the face of the decree, a payment to two of them could be counted at least in part - Satisfaction of the decree in respect of their shares,

Held:- Where there is a joint decree in the sense that there is no apportionment in the decree of the shares of the several decree-holders, it is not possible to mutilate the same and enter satisfaction piecemeal in respect of only such of the decree-holder or decree-holders who choose to receive amounts from the judgment-debtors. The reason is that such a decree is a joint one and none of the decree-holders has any defined share as such. The payment and satisfaction could be either in part or in full in respect of only the decree as such. and it must be to the whole body of the decree-holders or their authorised agent. One or more of the several decree-holders of a joint decree could be an agent or agents of the other or others. It is not the case here of the judgment-debtors that the decree-holders 3 and 4 received the amount towards the decree as such, and as authorised agents of the other decree-holders. The wording of Order 21, rule 1(1)(b) of the Code is unambiguous and plain and construing the expression "decree-holder" occurring in that provision as per the General Clauses Act so as to include the decree-holders in plurality, any payment towards the decree dues out of court could only be to the whole body of decree-holders when the decree is a joint and indivisible one or to the authorised agent of such joint decree-holders. The payment could be in part or in full towards such a decree, but no payment could be counted individually against one or the other of the joint decree-holders. *[Para.3]*

Cases referred to:-

Hanumanthappa v. Seethayya, (1949) 2 M.L.J.217= I.L.R. (1950) Mad.285= 62 L.W.539= A.I.R.1949 Mad.790; *Valchand v. Manekbai,* A.I.R.1953 Bombay 137.

Petition under section 115 of the Act V of 1908 praying the High Court to revise the Order of the Court of the Principal District Munsif, Erode dated 13.9.1982 and made in E.A.No.32/81 in E.P.No.313 of 1980 in O.S.No.1745/73.

N.Sivamani, for Petitioners.

A.K.Kumaraswamy, for Respondents.

The Court made the following

ORDER:- The judgment-debtors are the petitioners in this revision. The respondents are the decree-holders. The judgment-debtors filed a petition under Order 21, rule 2(2) of the Code of Civil Procedure, hereinafter referred to as the Code, to record part satisfaction of half of the decree amount in respect of decree-holders 3 and 4 to whom a sum of Rs.700/- is stated to have been paid on 18.11.1980. That application has been dismissed by the court below and that is how the judgment-debtors are before this court by way of this revision. The Court below found that the decree is a joint decree and the shares of the respective decree-holders are not apparent on the face of the decree, either expressly or by necessary implication. This aspect is not being put in issue before me. Order 21, rule 1(1)(b) of the Code contemplates that all money,

payable under a decree, could be paid out of Court to the decree-holder in any one of the modes contemplated therein. The question came up before the Full Bench of this Court in *Hanumanthappa v. Seethayya and Company*, (1949)2 M.L.J. 217= I.L.R. (1950) Mad.285= 62 L.W.539= A.I.R.1949 Mad.790 as to whether the expression "decree-holder" used in singular would include the plural also. Viswanatha Sastri, J. in a separate Judgment to form the majority view, has observed as follows:

> "Order 21, rule 1 directs that all money payable under a decree shall be paid as follows:
>
> (a) into the Court whose duty it is to execute the decree;
>
> (b) out of Court to the decree-holder, or
>
> (c) otherwise as the Court which made the decree directs.
>
> By virtue of section 13, Clause (2) General Clauses Act, words in the singular shall include the plural. Therefore, the term decree-holder in Order 21, rule 1, Clause (b) means "decree-holders" if there are two or more of them. Similarly in Order 21, rule 2, Clause (1) which speaks of a payment out of Court or adjustment to the satisfaction of the decree-holder, the expression "decree-holder" means "decree-holders", if there are two or more of them. It may readily be granted that where a joint decree is passed in favour of two or more persons, not related as partners, a payment out of Court, in order to be binding on all, must be made to all the joint decree-holders and that one of several joint decree-holders cannot give a valid discharge of the entire decree without the concurrence of the others..."

2. Here the question is as to whether the payment to the decree-holders 3 and 4 could be counted at least as satisfaction of the decree in respect of their shares. An answer to this question has been given by a Bench of the High Court of Bombay consisting of Rajadhyaksha and Vyas, JJ. in *Valchand v. Manekbai*, A.I.R. 1953 Bombay 137 where while confirming the view of a single Judge of the same High Court, it has been observed as follows:

> "The essence of the matter is that the decree sought to be executed is a joint decrees and has to be executed as such. If the shares of the decree-holders are apparent on the face of the decree either expressly or by necessary implication, it is not strictly speaking a joint decree.
>
> In such a case, as Mr.Justice Shah has pointed out, each decree-holder can take out execution in respect of his own share. But where the shares of the respective decree-holders are not apparent on the face of the decree, either expressly or by necessary implication, the decree which is sought to be executed is a joint decree, and the judgment-debtors must render satisfaction to the whole body of the decree-holders. Where one of the decree-holders is authorised to receive payment on behalf of all, the payment to him is obviously payment to the whole body of the decree-holders. But save in such cases, satisfaction must be rendered to the whole body of the judgment-creditors."

3. Where there is a joint decree in the sense that there is no apportionment in the decree of the shares of the several decree-holders, it is not possible to mutilate the same and enter satisfaction piecemeal in respect of only such of the decree-holder or decree-holders who choose to receive amounts from the judgment-debtor or judgment-debtors. The reason is such a decree is a joint one and none of the decree-holders has any defined share as such. The payment and satisfaction could be either in part or in full in respect of only the decree as such and it must be to the whole body of the decree-holders or their authorised agent. One or more several decree-holders of a joint decree could be an agent or agents of the other or others. It is not the case here of the judgment-debtors that decree-holders 3 and 4 received the amount towards the decree as such, and as authorised agents

of the other decree-holders. The wording of Order 21, rule 1(1)(b) of the Code is unambiguous and plain and construing the expression "decree-holder" occurring in that provision as per the General Clauses Act so as to include the decree-holders in plurality, any payment towards the decree out of Court could only be to the whole body of decree-holders when the decree is a joint and indivisible one or to the authorised agent of such joint decree-holders. The payment could be in part or in full towards such a decree, but no payment could be counted individually against one or the other of the joint decree-holders.

4. In the above view, I cannot take exception to the order passed by the Court below. Accordingly, the revision fails and the same is dismissed. I make no order as to costs.

R.S. —— *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Natarajan, J.*

*Writ Petition No.6036 of 1984.
29th June, 1984.*

S.Mohammed *Petitioner**

v.

The State of Tamil Nadu represented by the Secretary to Government Home Department, Madras-9 and others *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 18(2) - Not violative of Articles 14 and 19 of the Constitution of India, 1950.

Section 18(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act lays down that an order passed in execution under sub-section (1) shall not be subject to any appeal or revision. It was contended that as section 18 constitutes the Rent Controller a Civil Court, sub-section 2, was *ultra vires* as it dis-entitled an affected party to file an appeal or revision against an order in execution under sub-section (1).

Held:- From a reading of sub-section (1) of section 18 it may be seen that the Rent Controller has not been constituted a Civil Court for levying execution of orders passed under sections 10, 14, 15, 16 and 17 of the Act or any order passed in appeal under section 23 or any order passed in revision under section 25 of the Act. On the other hand, sub-section (1) merely states that every such order, referred to above, should be executed as if it is an order of a Civil Court. The section then says that *"for this purpose"*, the Controller shall have all the powers of a Civil Court." Therefore, for the limited purpose of executing an order, the Controller has been conferred by statute the powers exercisable by a Civil Court. Such being the case, it is not open to the petitioner to contend that the Rent Controller has been conferred the status of a Civil Court under section 18(1) and therefore an order passed by the Rent Controller in execution should be subject to further scrutiny by the appellate and revisional courts in the same manner as an order passed by a Civil Court in execution proceedings is subject to scrutiny. *[Para.2]*

Sub-section (1) of section 18 refers to orders passed under various sections, viz., 10,14,15,16 and 17. While the orders passed under sections 10 and 14 will be orders of eviction passed in favour of the landlords, the orders passed under sections 15,16 and 17 will be orders passed in favour of tenants. Section 15 provides for a tenant to reoccupy after repairs and section 16 provides for a tenant to reoccupy the building released under section 14(1)(b), if the landlord fails to demolish the building as per the undertaking given by him. More worthy of notice is section

17, which safeguards the rights of tenants by interdicting landlords from disrupting the amenities enjoyed by the tenant. If the contention of the petitioner that an affected party is entitled to an appeal or revision against every order passed by the Rent Controller in execution is accepted then it would lead to a chaotic situation, because the tenants, for whose protection the Act has been framed, will stand deprived of immediate benefits under sections 15, 16 or 17. A landlord who is called upon under section 15 or 16 to restore possession of the building to the tenant or to restore amenities to a tenant under section 17, can contumaciously drag on the proceedings by challenging the order of the Rent Controller in appeal or revision and harass the tenant. Similarly a landlord who is urgently in need of his building for his own occupation or by way of additional accommodation can also be kept at bay by an unreasonable tenant preferring an appeal or revision against the order of execution and dragging on matters endlessly. It is in order to prevent such a calamitous situation, the legislature has advisedly and designedly enacted sub-section (2) and specifically provided that an order passed in execution under sub-section (1) shall not be subject to any appeal or revision. *[Para.3]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of Declaration declaring that section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended Act 23/73 in so far as the petitioner is concerned is violative of Articles 14 and 19 of the Constitution of India.

T.Chengalvarayan, for Petitioner.

The Court made the following

ORDER:- In a desparate attempt to resist the execution levied against him by the 3rd respondent (landlord) to evict him, the tenant/petitioner has come forward with this writ petition in order to nullify section 18(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960 (hereinafter referred to as the Act). Section 18(2) lays down that an order passed in execution under sub-section (1) shall not be subject to any appeal or revision. According to the petitioner sub-section (1) of Section 18 constitutes the Rent Controller a Civil Court and therefore, sub-section (2) is *ultra vires*, as it disentitles an affected party to file an appeal or revision against an order in execution made under sub-section (1).

2. Mohan, J. has already upheld the validity of sub-section (2) of Section 18 of the Act in *Purushothama Chettiar v. State of Tamil Nadu and others*, W.P.No. 5819 of 1979 Judgment dated 6.2.1980 wherein the learned Judge has held as follows:

> "Under section 18(1) of the Tamil Nadu Buildings (Lease and Rent Control) Act, an order of eviction is deemed as an order of a Civil Court only for the limited purpose of execution. That does not mean that the further remedy available under the Code of Civil Procedure, namely, appeal and revision, should be provided for. There is no discrimination whatever, when the provisions of a special statute, namely, the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 applied."

Following this Order, this writ petition deserves to be dismissed *in limine*, without further discussion. Nevertheless, it is appropriate to refer to certain other factors, as they would show how patently untenable the contention of the petitioner is. Section 18 of the Act, reads as follows:-

> "18. *Execution of Orders:-* (1) Every order made under sections 10,14,15,16 and 17 and every order passed on appeal under section 23 or on revision under section 25, shall be executed by the Controller, as if such order is an order of a Civil Court and for this purpose, the Controller shall have all the powers of a Civil Court. (2) An order passed in execution under sub-section (1) shall not be subject to any appeal or revision."

From a reading of sub-section (1), it may

be seen that the Rent Controller has not been constituted a Civil Court for levying execution of orders passed under sections 10,14,15,16 and 17 of the Act or any order passed in appeal under section 23 or any order passed in revision under section 25 of the Act. On the other hand, sub-section (1) merely states that every such order, referred to above, should be executed as if it is an order of a civil court. The section then says that *"for this purpose*, the Controller shall have all the powers of a civil court." Therefore, for the limited purpose of executing an order, the Controller has been conferred by statute the powers exercisable by a Civil Court. Such being the case, it is not open to the petitioner to contend that the Rent Controller has been conferred the status of a Civil Court under section 18(1) and therefore an order passed by the Rent Controller in execution should be subject to further scrutiny by the appellate and revisional courts in the same manner as an order passed by a civil court in execution proceedings is subject to scrutiny.

3. It has then to be pointed out that sub-section (1) of section 18 refers to orders passed under various sections, viz., 10,14,15,16 and 17. While the orders passed under sections 10 and 14 will be orders of eviction passed in favour of the landlords, the orders passed under sections 15,16 and 17 will be orders passed in favour of tenants. Section 15 provides for a tenant to reoccupy after repairs and section 16 provides for a tenant to reoccupy the building released under section 14(1)(b), if the landlord fails to demolish the building as per the undertaking given by him. More worthy of notice is section 17, which safeguards the rights of tenants by interdicting landlords from disrupting the amenities enjoyed by the tenants. If we are to accept the contention of the petitioner that an affected party is entitled to an appeal or revision against every order passed by the Rent Controller in execution, then it would lead to a chaotic situation, because the tenants, for whose protection the Act has been framed, will stand deprived of immediate benefits under sections 15, 16 and 17. A landlord, who is called upon under section 15 of 16 to restore possession of the building to the tenant or to restore amenities to a tenant under section 17, can contumaciously drag on the proceedings by challenging the order of the Rent Controller in appeal or revision and harass the tenant. Similarly a landlord who is urgently in need of his building for his own occupation or by way of additional accommodation can also be kept at bay by an unreasonable tenant preferring an appeal or revision against the order of execution and dragging on matters endlessly. It is in order to prevent such a calamitous situation, the Legislature has advisedly and designedly enacted sub-section (2) and specifically provided that an order passed in execution under sub-section (1) shall not be subject to any appeal or revision.

Thus, it has to be pointed out that legally as well as factually, the petitioner's contention is totally bereft of substance and the writ petition does not lie and accordingly it will stand dismissed.

B.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*Second Appeal No.1871/79.27*th July*, 1984.

Ramachandran and others *Appellants**

v.

S.Jayaraman *Respondent.*

Civil Procedure Code (V of 1908), section 47, Explanation II(b) - 'Representation' - Meaning of.

Clause (b) of Explanation II to section 47, Civil Procedure Code, says that all questions relating to the delivery of possession of the property sold to the purchaser of his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of that section. Whether a particular person is a representative or not, has been discussed in *Ajodhya Roy v. Hardwar Roy*, (1909)1 I.C.213= 9 Cal.L.J.485. It was observed therein as follows· "To determine, whether a particular person is a representative of a party to the suit, the two tests to be applied are first, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in the person who is sought to be treated as representative and secondly, if there has been devolution of interest whether, so far as such interest is concerned, that is bound by the decree." Thus "representative" means the transferee of the interest of a party who, so far as that interest is concerned is bound by the decree. *[Para.6]*

The plaintiff in the instant case not being a purchaser of the suit property in execution of a decree nor his representative but only a person impleaded in his personal capacity as a tenant along with two others, section 47 will not be a bar to his suit for an injunction to restrain the defendants from taking delivery of the suit properties, by executing a decree obtained in a suit brought by the father of the defendants for recovery of possession of the concerned properties. *[Para.6]*

Case referred to:-

Ajodhya Roy v. Hardwar Roy, (1909)9 Cal. L.J.485. 1 I.C.213.

Muthurajan, for Appellants.

P.Veeraraghavan, for Respondent.

The Court delivered the following

JUDGMENT:- The defendants are the appellants. The suit out of which this second appeal arises was filed by the respondent-plaintiff for an injunction restraining the defendants from taking delivery of the suit properties by executing the decree in O.S.No.410 of 1968 on the file of the District Munsif's Court, Sirkali. That suit, O.S.No.410 of 1968, was instituted by one Venkatesan Pillai, father of defendants, for recovery of possession of suit properties against one Ajeetha Bivi, Sheik Dawood and Danapal. The said Danapal is the brother of the respondent in this appeal. Pending trial, Venkatesan Pillai died and the defendants were brought on record. The suit was decreed *ex parte* in favour of the defendants. The plaintiff-respondent by some arrangement with his brother is in possession of the suit property and has obtained the kudiyiruppu assignment deed evidenced by Exhibit A-1. The defendants objected to this assignment by the Authorised Officer (Kudiyiruppu), Mayuram. In appeal preferred by the second defendant, the order was confirmed by the appellate authority, District Revenue Officer, Thanjavur. The plaint averred that the defendants are trying to execute the decree in O.S.No.410 of 1968 and he having obtained the Kudiyiruppu assignment cannot be evicted and that the defendants should be restrained by an injunction from taking delivery of the suit property by execution of the decree in O.S.No.410 of 1968.

2. The suit was resisted by the appellants-defendants who have stated that the plaintiff is not entitled to the benefits of Kudiyiruppu Act, that he is a taxi driver at Madras, and that the Kudiyiruppu assignment deed (oppadai pathiram) is not valid and binding on the defendants.

3. The trial Court found that the plaintiff will be entitled to the benefits of Act 40 of 1971 and that he will be entitled to a decree for injunction and decreed the suit. In appeal, the judgment of the trial Court was confirmed and the appeal was dismissed.

4. The only substantial question of law formulated by a learned Judge of this Court in the second appeal is "whether the subsequent issue of patta under Act 40 of 1971 would have the effect of nullifying the decree of the Civil Court

obtained earlier?". In addition to this point, learned Counsel appearing for the appellants raised another point of law which he has not raised in the courts below, nor in the memorandum of grounds of appeal in this Court, and that is, that section 47, Civil Procedure Code, is a bar for filing of the suit. These two points of law can be dealt with together.

5. The suit, O.S.No.410 of 1968 was instituted by Venkatesam Pillai, father of defendants, against three persons, Ajeetha Bivi, Sheik Dawood and Danapal, as is evident from Ex.A-5, copy of the plaint filed in this case. There is no dispute that the suit was decreed *ex parte* favour of the defendants who have been impleaded in the suit as legal representatives of Venkatesam Pillai, who died pending suit. The respondent was not a party to the suit, O.S.No.410 of 1968. He has obtained the kudiyiruppu assignment under Exhibit A-1. According to the plaintiff, under the guise of execution of the decree in O.S.No.410 of 1968, the defendants are trying to take delivery of the suit property for which he has obtained kudiyiruppu assignment under Exhibit A-1. On the other hand, the contention of the appellants is that in order to defeat the decree in O.S.No.410 of 1968, the plaintiff and his brother colluded together and the plaintiff has obtained assignment in respect of the suit property and that the assignment is not valid. It is not necessary to enter into any discussion whether there was any collusion. It is sufficient to point out that the appellants cannot question the validity of the kudiyiruppu patta any longer as the kudiyiruppu patta was questioned by the second defendant before the Additional Authorised Officer (Kudiyiruppu), Mayuram, by the defendants in C.No.59 of 1972 evidenced by Ex.A-2 and the petition filed by the second defendant was dismissed confirming the grant of kudiyiruppu assignment (kudiyiruppu patta) in favour of the plaintiff. The District Revenue Officer, Thanjavur, confirmed the grant of kudiyiruppu assignment (patta) in favour of the plaintiff and dismissed the appeal. That order has become final and the validity of the grant of kudiyiruppu assignment (patta) cannot be challenged by the defendants.

6. It was earlier pointed out that the decree obtained by the defendants was against the brother of the plaintiff and not against the plaintiff and that decree will not bind the plaintiff here. But the question is whether section 47, Civil Procedure Code, is a bar to the institution of a suit by the plaintiff. Section 47 embraces all questions arising between the parties to the suit in which the decree was passed and relates to the execution, discharge, or satisfaction of the decree. *Prima facie*, section 47, Civil Procedure Code, is not applicable, for the plaintiff-respondent is not a party to O.S.No.410 of 1968. But, however, my attention was invited to Explanation II to section 47. Explanation II(a) says that for the purposes of Section 47, a purchaser of property at a sale in execution of the decree shall be deemed to be a party to the suit in which the decree is passed and clause (b) of Explanation II says that all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of that section. But the plaintiff is not a purchaser of the suit property in a sale in execution of the decree, nor is he the representative. Whether a particular person is a representative or not, has been discussed in *Ajodhya Roy v. Hardwar Roy*, (1909) 9 Cal.L.J. 485= (1909)1 I.C.213. It was observed therein as follows.

> "To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are first, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in the person who is sought to be treated as representative and secondly, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree."

Therefore, the term 'representative' means the transferee of the interest of a party

who so far as that interest is concerned is bound by the decree. Learned Counsel then pointed out that Danapal and his brother, the plaintiff-respondent herein were members of a joint family. But there is no evidence in that regard. Danapal was impleaded in O.S.No.410 of 1968 not as a manager of a joint family, but in his individual capacity as a tenant along with two others. In the circumstances, section 47, Civil Procedure Code, will not be a bar to the suit. The result is, the second appeal fails and is dismissed and the judgment and decree of the Courts below are confirmed. No costs.

B.S. —— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.Shanmukham, J.*

*C.R.P.No.4081 of 1982. 29*th April*, 1983.

Amirkhan *Petitioner**

v.

Ghouse Khan *Respondent.*

Registration Act (16 of 1908), sections 17 and 49 - Gift of immovable property by a Mohamedan - When reduced to writing requires registration.

Mohamedan Law recognises an oral gift. According to section 129 of the Transfer of Property Act, nothing in Chapter VII relates to gifts of immovable property made in the contemplation of death or shall be deemed to affect any rule of Mohamedan Law. Thus a gift by a Mohamedan is exempt from the provisions of Chapter VII of the Transfer of Property Act. To argue that because the personal law permits an oral gift by a Mohamedan, it would follow that even if the gift deed were to be reduced to writing, it does not requires registration, is not correct. For under section 123 of the Transfer of Property Act, no gift of immovable property shall be made except by a registered instrument signed by or on behalf of the donor attested by at least two witnesses. In order to avoid any conflict between section 123 and the personal law which enables a Mohamedan to make an oral gift, section 129 of the Transfer of Property Act was necessitated. That is all the object of section 129 of the Transfer of Property Act. The fact that there was such an exemption under section 129 will not *ipso facto* indicate that the provisions under the Registration Act, 1908 will not also apply to a deed or gift reduced to writing by a Mohamedan. The relevant provisions in the Registration Act are section 17 and section 49. There is no saving clause or section in the Registration Act similar to section 129 found in the Transfer of Property Act. It follows that all documents of gift either created by a Mohamedan or by a non-Mohamedan are governed by the Registration Act. The combined force of section 17 and section 49 requires that any deed of gift if reduced to writing should be registered, otherwise it would not be admissible in evidence. *[Para.2]*

Cases referred to:-

M.Rawther v. M.Charayil, (1971) K.L.T.684: A.I.R.1972 Kerala 27; *Uddandu v. Masthan Bi*, A.I.R.1975 A.P.271; *Gulam Ahmed v. Mohamed Sidiq*, A.I.R.1974 J. & K. 59; *Tek Bahadur Bhujil v. Debi Singh Bhujil*, (1966)2 S.C.J.290: A.I.R.1966 S.C.292

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional District Munsif of Salem dated 30.8.82 and made in I.A.No.1260/82 in O.S.No. 1584/79.

K.Kumaraswami Pillai, for Petitioner.

M.Srinivasan, for Respondent.

The Court made the following

ORDER:- Two interesting questions arise

for consideration in this revision. One is whether the gift of the immovable property by a Mohamadan if reduced to writing, requires registration. Another is whether the gift deed in this case records any past transaction or the deed itself creates a right in the immovable property. The court below held that the document dated 6.3.1978 itself created a right in the immovable property and therefore requires registration. On that ground it refused to admit this document in evidence. It is this order that is canvassed in this revision.

2. Mohamedan Law recognises an oral gift. The question is whether notwithstanding such right to created a gift orally, if a Mohamedan should reduce the gift to writing, the same requires registration. According to section 129 of the Transfer of Property Act, nothing in Chapter VII relates to gift of immovable property made in comtemplation of death, or shall be deemed to affect any rule of Mohamedan Law. Thus a gift by a Mohamedan is exempt from the purview of Chapter VII of the transfer of Property Act. This is taken advantage of by the learned counsel for the petitioner to submit that because the personal law permits an oral gift by a Mohamedan, it would follow that even if the gift deed were to be reduced to writing, it does not require registration. In my view such an approach is wholly erroneous. For under section 123 of the Transfer of Property Act no gift of immovable property shall be made except by a registered instrument signed by or on behalf of the donor attested by at least two witnesses. In order to avoid any conflict between section 123 and the personal law which enables Mohamedan to make an oral gift, section 129 of the Transfer of Property Act was necessitated. That is all the object of section 129 of the Transfer of Property Act. The fact that there was such an exemption under section 129 will not *ipso facto* indicate that the provisions under the Registration Act, 1908 will not also apply to a deed of gift reduced to writing by a Mohamedan. The relevant provisions in the Registration Act are section 17 and section 49. There is no saving clause or section in the Registration Act similar to section 129 found in the Transfer of Property Act. It follows that all documents of gift either created by a Mohamedan or by a non-Mohamedan are governed by the Registration Act. The combined force of section 17 and section 49 requires that any deed of gift if reduced to writing should be registered, otherwise it would not be admissible in evidence.

3. Section 17(1)(a) of the Registration Act relates to instrument of gift of immovable property. It expressly mandates that the instrument of gift of an immovable property shall be registered. In the instant case, the document dated 6.3.1978 is a deed of gift, whereby the right in the immovable property is created for the first time. It is necessary at this stage to extract the relevant portion in the document which is in Tamil.

"ஆகையால் என்னுடைய ஜீவிய காலத்திலேயே எனக்குப் பாத்தியப்பட்ட சொத்து விஷயமாய் ஓர் ஏற்பாடு செய்து வைக்க வேண்டியது மிகவும் அவசியமானதாக நான் முடிவு செய்து அதன்படி உன் பேரில் எனக்கு இருந்து வரும் அன்பின் காரணமாகவும் அபிமானத்தாலும் அடியில் கண்ட 'சொத்தில் எனக்கு பாத்தியப் பட்ட சொத்தை இந்த உறிலா என்னும் தான சாசன மூலம் ஆதர்வு செய்து வைக்க சில நம் குடும்ப வரலாறறை தெரிந்துள்ள பொது மனிதர்களையும் நெருங்கிய சுற்றத்தாரையும் நேரில் வைத்துக்கொண்டு இந்த உறிலா என்னும் தான சாசன பத்திரப்படி அடியில் கண்ட சொத்துக்களில எனக்கு உணடான பாக பாத்தியதையை இதன் மூலம் ஆதரவு செய்து கொடுத்து சொத்தையும் உமமிடம கலாதீனமும் செய்து கொடுத்து விட்டேன்'

It is clearly indicated therein that only under this deed of gift, the property set out in the schedule is gifted to the donee therein in the presence of his close relations and "known common friends". It also recites that under this document delivery of possession is being handed over. From the above plain next, it is not possible to construe the document as evidencing a past transaction of a gift.

4. In view of my above assessment I cannot but hold that though the Mohamadan can create a valid gift orally, if he should reduce the same in writing the gift will not be valid unless it is duly registered.

5. It is true that Mr.Justice V.R.Krishnayyar as he then was in *M.Rawther v. M.Charayil*, (1971) K.L.T.684= A.I.R.1972 Kerala 27 held:

"The application of Muslim personal law to gifts does not preclude application of other Laws which do not run counter to the rules of Muslim law. The need for a document its attestation and registration under section 123 of the Transfer of Property Act are not necessarily inhibited by section 2 of Act 23 of 1937. Moreover, the expression "gift" in section 2 along with trusts and trust properties and wakfs takes colour from the society of these words. I am inclined to think that the amplitude of the expression "gift" in the Transfer of Property Act (section 129) must be so read down to restrict it to transaction and persons with the religious or charitable motivation or purpose."

nd again in paragraph 8 it observes thus:-

" I regret my inability to agree with the reasoning in these decisions. In the context of section 17, a document is the same as an instrument and to draw nice distinctions between the two only serves to baffle, not to illumine, Mulla says: The words "document" and "Instrument" are used interchangable in the Act." An instrument of gift is one whereby a gift is made. Wherein law a gift cannot be effected by a registered deed as such, it cannot be an instrument of gift. The legal position is well settled. A muslim gift may be valid even without a registered deed and may be invalid even with a registered deed. Registration being irrelevant to its legal force, a deed setting out a Muslim gift cannot be regarded as constitute of the gift and is not compulsorily registrable."

The above observation of the learned Judge might support the contention put forward by the learned counsel for the petitioner that in all cases where a Mohamadan should make a gift, such a gift is valid notwithstanding that it was reduced to writing. I have already pointed out that the very purpose of section 129 of the Transfer of Property Act is to avoid any friction between section 123 of the Transfer of Property Act and the personal law relating to Muhamadan which permitted the Muhamadan to make valid gift orally.

6. Secondly, there is no such reservation at all make in the Registration Act. The preamble to the registration act provides that to consolidate the enactment relating to registration of document, it is hereby enacted as set out therein. Neither in section 17 nor in section 49 is there any indication even impliedly that these provisions would not be applicable to a gift made by Mohamadan if it should be made in writing. In view of the plain language employed in section 17 and section 49 of the Registration Act read in contrast with an express embargo provided under section 129 excluding the operation of the Transfer of Property Act to the gift made by Muhamadan, I am unable to agree with the learned Judge. As a matter of fact, a learned Judge of the Andhra Pradesh High Court in *Chota Uddandu v. Masthan Bi*, A.I.R.1975 A.P.271 had not approved the observation made in *M.Rawther v. M.Charayil*, (1971) K.L.T. 684= A.I.R.1972 Kerala 27. According to the learned Judge, if there is a contemporaneous document it should be registered, notwithstanding if all the formalities as prescribed by Mohamadan law regarding the making of gift are satisfied, gift is valid without a written instrument. With due respect to the learned Judge I prefer to follow the reasoning which is in consonance with the express provision enacted under sections 123 and 129 of the Transfer of Property Act as also sections 17 and 49 of the Registration Act.

7. It is interesting to note that the three Judges belonging to the said religion have in *Gulam Ahmed v. Mohamed Sidiq*, A.I.R.1974 Jammu and Kashmir page 59 held that where there is executed an instrument and its execution is contempor-

-aneous with the making of the gift, then in that case the instrument must be registered as provided under section 17 of the Registration Act. Thus I find, that my construction of sections 123 and 129 of the Transfer of Property Act in contrast with sections 17 and 49 of the Registration Act has the approval of a single Judge of the Andhra Pradesh High Court and a Full Bench Judgment of Jammu and Kashmir High Court.

8. In support of the contention that if the documents were to be evidenced of past transaction, then it would not require registration, the learned counsel for the petitioner brought to my notice the decision of the Supreme Court reported in *Tek Bahadur Bhujil v. Debi Singh Bhujil*, A.I.R.1966 S.C.292: (1966)2 S.C.J.290. I have held that this document does not record the past transaction, but under the instrument itself a right in immovable property is created. Further the Supreme Court decision related to a family arrangement. Thus, I find, the petitioner cannot rely upon the above ratio as there is no room for the application of the principles laid down by the Supreme Court.

The result is that this revision fails and is dismissed, but without costs.

B.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *T. Sathiadev, J.*

*Writ Petition No.6516 of 1979.
21st January, 1983.

R.Mohanarangam *Petitioner**

v.

The Food Corporation of India, represented by Zonal Manager, F.C.I., Madras-6 and others *Respondents.*

(A) Constitution of India (1950), Article 226.

(B) Food Corporation of India Act (37 of 1964), section 45 - Regulations framed under - Circulars contrary to regulations cannot be enforced.

It is always beneficial to service personnel to have definiteness regarding their service conditions. Piece-meal and indefinite changes effected by periodical circulars, would make it impossible for a clear comprehension of the rule, that would be applicable and it would bring about an unsettled situation resulting in ambiguity and no cogent application of rules. As held by the Supreme Court, administrative directions can fill up the gaps in the rules because they speak and do vitiative service in a vacuous field, but at the same time it must be established that the administrative order or instruction or circular has resulted in a stable principle emerging out of such circulars, and which is not inconsistent with the rules or regulations or the provisions of the Act. To bring about co-ordination and identical approach to be made all over the country, there would be need to issue endless instructions to the concerned authorities from time to time, as to how best the existing procedures could be further modified, altered or amended etc, and such directions which are more of a procedural nature, cannot be treated as justifiable and enforceable orders. The circulars are purely administrative instructions, to bring about

uniformity, and from time to time they have been issued to streamline the procedure for preparation of probationary reports and for early decisions to be taken. Undoubtedly, non-compliance of such circulars would entail disciplinary action against the competent authority. But such an indication therein would not upgrade the circulars to equate them to the position of regulations and make them enforceable orders. *[Para.16]*

Cases referred to:-

Sukhbans Singh v. State of Punjab, (1963)1 S.C.R.416: (1963)1 L.L.J.671: A.I.R.1962 S.C.1711; *State of U.P. v. Akbar Ali*, (1967)2 S.C.J.79: (1966)3 S.C.R.821: (1967)1 L.L.J.708: A.I.R.1966 S.C.1842; *Kedur Nath v. State of Punjab*, (1973)1 S.C.J.95: A.I.R.1972 S.C.873; *State of Maharashtra v. V.R.Saboji*, (1979)4 S.C.C.466: (1980)1 S.C.R.551: (1979) S.L.J.621: A.I.R.1980 S.C.42; *Sukhdev Singh v. Bhagatram*, (1974)2 S.C.J.326: (1974)2 S.C.C.213: A.I.R.1974 S.C.1331; *G.J.Fernandez v. The State of Mysore*, (1968)1 S.C.J.562: (1967)3 S.C.R.636: A.I.R.1967 S.C.1753; *C.Ramanathan v. Acting Zonal Manager, F.C.I.*, (1980)1 Lab.L.J.1; *Union of India v. K.P.Joseph*, (1974)2 S.C.J.216: (1973)2 S.C.R.752: A.I.R.1973 S.C.303; *Sant Ram Sharma v. State of Rajasthan*, (1968)1 S.C.J.672: (1968)1 S.C.R.111: A.I.R.1967 S.C.1910; *State of U.P. v. Chandra Mohan*, (1977)4 S.C.C.345: (1977)3 All L.R.673: (1977) Lab.I.C. 1923: (1978)1 S.C.R.521: A.I.R.1977 S.C.2411; *G.S.Ramaswamy v. I.G. of Police*, (1965)1 Lab.L.J.118= (1964)6 S.C.R.279= A.I.R.1966 S.C.175.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings of the 1st respondent in Office Order No.345/79 Estt., I dated 30.11.79 and quash the same.

S.Govind Swaminathan, for *S.Subbiah*, for Petitioner.

D. Raju, for Respondents.

The Court made the following

ORDER:- Petitioner was appointed as Junior Godown Keeper on 19.7.1959 in the Department of Food, under Regional Directorate, Food, Madras. He was transferred to Food Corporation of India in 1965 and promoted as Senior Godown Keeper in 1969. He was promoted as Assistant Manager (Depot) and was placed on probation by order dated 29.10.1977 for a period of one year as per Regulation 15(1) of F.C.I. Staff Regulations, 1971, framed under section 45 of Food Corporation Act, 1964. As the probation reports were found to be unsatisfactory, he was reverted to the post of Assistant, Grade I (Depot) under Regulation 15(3), by the impugned order dated 30.11.1979 which has resulted in the filing of this writ petition to quash the said order.

2. Petitioner submits that apart from Regulation 15, several administrative instructions have been issued regarding probation as per circulars dated 22.4.1967, 31.8.1974, 14.1.1977, 8.3.1979, 5.11.1979 etc. and that when the period of one year expired on 6.12.1978, and no adverse reports having been communicated to him, it is deemed that he had satisfactorily completed probation. When, as per the circulars when his probation had not been extended within a period of 4 weeks from the date of completion of the probation, as per R.15(1) he rightly presumed that he had satisfactorily completed probation. He received belatedly a communication dated 31.7.1979 i.e. after about 20 months of working as Assistant Manager (Depot), extending his period of probation, which is illegal. He submitted an appeal to the Zonal Manager on 24.9.1979 to review and nullify the extension order as seeking for declaration of confirmation, but he had not received any reply till date of filing of writ petition. Surprisingly, the impugned order was passed reverting him, which is not only against the Regulations, but also against several circulars issued from time to time. As per the circular, probation reports have to be written every 6 months, and when no communication had been sent to him as per the circulars within the first period of one year, he believes that the probation reports have

been deliberately re-written to prejudice his interests. Failure to comply with the various circulars referred to in the affidavit, which have statutory force, has resulted in an illegal order being passed and hence, he is entitled to a direction to confirm him in the post of Assistant Manager (Depot) with effect from 7.12.1978. He also refers to the transfer orders made, posting him to Tuticorin, Udumalpet and Kurichi during the relevant period alleging that with *mala fide* intentions and with a view to victimise him, the decision having been taken, reverting him inspite of his unblemished record of service it had greatly prejudiced his prospects.

3. In the counter-affidavit filed by respondents 1 to 4, it is claimed that the circulars relied upon do not form part of the conditions of service and they have no statutory force on which any right could be founded resulting in this Court exercising powers under Article 226 of the Constitution of India. The instructions referred to by the petitioner contemplate early preparation of reports, and in this case, there was some delay in the reports being received, but that would not confer a right on the petitioner for automatic confirmation. Within the period of 2 years contemplated under R.15(1) and (2), the impugned order having been passed, petitioner cannot claim that any of the statutory regulations have been contravened. On the report received, it turned out that he had not devoted his full attention in discharging his duties by maintaining absolute integrity and devotion to duty and that he has failed to honestly and faithfully serve and endeavour to promote the interests of the Corporation during the period of his probation. He induced members of F.C.I.E.U, to agitate and demonstrate against his transfer for his personal gain. His behavious as an officer of the corporation was also not upto the mark. During the relevant period, he had brought the district adminsitration almost to a grinding halt by making it as one of the issues involved in the disputes raised by the Union. The claim made that his performance was blemishless is not correct and it was only based upon two half yearly probation reports for the extended period, a decision was taken by the competent authority to revert him to the lower post, since there was no improvement and the performance for the entire period of two years was unsatisfactory. The allegation that reports have been re-written is incorrect because the two probation reports, one for the period from 7.12.1977 to 6.6.1978, and the other from 7.6.1978 to 6.12.1978 for the first year, and two reports for the subsequent year were written on time and only after consideration of the contents of the reports, an order of reversion was passed. As per R.15(3) an order of reversion can be passed without notice and without assigning any reason. Hence, the impugned order being valid, the petition is liable to be dismissed.

4. Separate counter-affidavits have been filed by respondents 3 and 4.

5. A lengthy reply affidavit has been filed by petitioner taking strong objections to the stand taken by respondents and reiterating that the instructions issued under circulars dated 31.8.1973 and 16.6.1977 having not been complied with on time, and hence, there could have been no extension of probation as provided under R.15(2). In para 7, petitioner has catalogued 6 of the circulars which are relevant and applicable to confirm a probationer. Thereafrer, in an elaborate manner he adverts to the circumstances under which he was transferred and to what extent, he was not to be blamed for such transfer orders being passed, and contends that it was done only with *mala fide* intentions.

6. When the writ petition came up for hearing in April 1982, an order was passed by this Court to communicate to the petitioner, the petitioner, the adverse remarks which have been taken into account. It was felt that in the event of himself being made aware of adverse remarks, he may then realise as to why he had been reverted and that he may also seek such remedies as are available as per the Regulations, against such adverse remarks. It is only thereafter, the adverse remarks were communicated, to which he made his representation and it was rejected by order dated 16.7.1982.

7. The foremost contention of the petitioner is that apart from the F.C.I., Staff Regulations, 1971 (hereinafter referred to as Regulations), there are various circulars which have been issued from time to time and which have statutory force, and since none of those circulars have been followed, the order of reversion is illegal.

8. It is the admitted case that in so far as probation is concerned, the statutory regulation is R.15. Clause 1 therein provides that the period of probation would be one year from the date of appointment. Clause 2 contemplates extension of the period of probation by a further period not exceeding one year. Clause 3 deals with a direct recruit being discharged with notice and a promotee being reverted to a lower post without notice and without assigning any reason. Clause 4 provides as follows:

> "An employee who has satisfactorily completed his probation in any post shall thereupon confirmed as soon thereafter as possible."

Clause 5 is not relevant. As per the statutory regulation, as soon as the period contemplated therein is over, it does not contemplate any automatic confirmation of probation. Petitioner claims in para.9 of his affidavit that on completion of one year probation on 6.12.1978, he rightly presumed that he had satisfactorily completed his probation and that when his probation had not been extended within a period of 4 weeks from the date of the completion as stipulated in Head Office's Circular, the respondents have no power to extend the period of probation. Apart from other circulars, which would be referred to hereunder, considerable reliance is placed on Circular No.16-1/77-EP dated 16.6.1977. This circular refers to the contents of R.15(1) and (2) and proceeds to deal with the aspect as to whether there could be automatic confirmation after the expiry of the prescribed period of probation. After referring to circular dated 31.8.1973 which stated that unless and until orders are passed confirming probation within a period of 2 years from the date of appointment on probation, then the persons concerned would not be deemed to have been automatically confirmed but if period is formally extended for one year or less or where no such order is passed, then the concerned person is deemed to have been automatically confirmed after expirty of 2 years. It is to ensure appropriate action being taken, certain instructions were issued therein for guidance. It dealt with what should be done within 4 weeks of completion of one year and of the preparation of half-yearly probation report, which is unsatisfactory, and within what time, the report should reach the Head Office etc.,

9. Since petitioner has claimed in the affidavit that after the expiry of the period of one year, he presumed that he had satisfactorily completed his probation, it has to be seen whether any reliance could be placed on this circular as having a statutory force. When the regulation does not contemplate any automatic confirmation, no circular contrary to such a statutory regulation, could be enforced.

In *Sukhbans Singh v. State of Punjab*, (1963)1 L.L.J.671: (1963)1 S.C.R.416: A.I.R. 1962 S.C.1711 it was held that a probationer cannot automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed, expressly provide for such a result. This view was reported in *G.S.Ramaswamy v. I.G. of Police*, (1965)1 L.L.J.118= (1964)6 S.C.R.279= A.I.R.1966 S.C.175 to the effect that:

> "... even though a probationer may have continued to act in the post to which he is appointed on probation for more than the initial period of brobation, he cannot become a permanent servant merely because of efflux of time, unless the rules of service which govern him specifically lay down that the probationer will be automatically confirmed after the initial period of probation is over."

In *State of U.P. v. Akbar Ali*, (1967)1 L.L.J.708: (1966)3 S.C.R.821: (1967)2 S.C.J.79: A.I.R.1966 S.C.1842 it was held that in a case an employee is allowed to continue in the post even after the

period of probation without passing an order of confirmation, the only possible view to take is that, by implication the period of probation was extended.

In *Kedar Nath v. State of Punjab*, (1973)1 S.C.J.95= A.I.R.1972 S.C.873 it was again held that when a period of probation is specified, it does not follow that at the end of the said period, there can be automatic confirmation even if no order is passed in that behalf. It is only when the terms of appointment clearly indicate that confirmation could be made or there is a specific service rule to that effect, the expiration of the period of probation does not necessarily lead to confirmation. At the end of period of probation, an order confirming the officer is required to be passed and if no such order is passed and if no reversion is ordered to his substantive post, the result merely is that he continues in his post as a probationer.

In *State of Maharashtra v. V.R.Saboji*, (1979)4 S.C.C.466= (1980)1 S.C.R.551= (1979) S.L.J.621= A.I.R.1980 S.C.42 it was held as follows:-

> "But it is a matter of common knowledge that in many branches of Government Service including the Judiciary that for administrative reasons or otherwise, the confirmation is delayed and is made at a subsequent time. It may also be delayed for watching the work of the Government servant for a further period. The expression "unless otherwise expressly directed governs only the first part of clause (iv) and not the second. The rule in question therefore, comes under the ordinary and normal rule that without an express order of confirmation a Government servant will not be taken to have been confirmed in the post to which he was appointed temporarily and/or on probation. An officer cannot be deemed to have been confirmed in service merely because after completion of probationary period he was appointed as officiating Civil Judge."

Therefore, in the light of such crystal and clear pronouncements made by Supreme Court, R.15 as it stands having not contemplated any automatic confirmation, the circular dated 16.6.1977 cannot envisage a deeming provision for automatic confirmation. When the circular is beset with such illegality, it cannot be claimed to have any statutory force. Perhaps realising this position, Mr.Govind Swaminathan, learned Counsel for the petitioner, during the course of the arguments had not stressed on this aspect, though this point had been taken in the affidavit, claiming that as soon as the period of one year was over, petitioner presumed that he had satisfactorily completed the period of probation.

10. Mr.Govind Swaminathan, learned Counsel for the petitioner, would submit that when the other circulars contemplate an opportunity being given to the probationer to show better performance, and when such opportunities having not been extended as per these circulars, which have statutory force, the order of reversion as passed, deserves to be set aside, and the petitioner be continued on probations and the circulars hereinafter referred to. He would submit that circular dated 16.6.1977 also deals with what should be done during the first year of probation.

11. Petitioner relies upon the circular dated 22.4.1967 as a relevant one, dealing with probation. Whereas, as pointed out by respondents, it does not deal with declaration of probation, but merely relates to communication of adverse remarks in the annual confidential report. It is the circular dated 31.8.1973 which contemplates action being taken within a period of 4 weeks from the date of completion of initial period of probation for taking a decision as to whether it should be extended or not. It is claimed that when no such action had been taken within 4 weeks from 6.12.1978, respondents have contravened this statutory circular. Circular dated 18.3.1976 deals with preparation of probation reports and laid emphasis that the report of the last quarter of the second year of probation should reach the concerned authority positively one month before the expiry of the extended probationary period. Again circular dated 30.11.1976 prescribed that reporting officer should be reminded once or twice, and failing compliance, a warning letter should be issued to him and any default

committed should result in taking disciplinary proceedings.

12. Next circular dated 14.1.1977 after reiterating what had been stated, required strict compliance about submission of probationary reports on time. This was followed by circular dated 16.6.1977, already referred to. Later on circular dated 8.3.1979, once again exphasises that a probationer whose work is not considered satisfactory during the fist half-yearly probation period should be placed in a different seat and under different officer for the rest of the probationer period and he should invariably be informed of his shortcomings in writing well within a period of one month of the receipt of the first half-yearly probation report, so that he knows his drawback and could improve upon his performance and that these instructions should be strictly adhered to. Later, circular dated 5.11.1979 again dealt with the need for prompt preparation of periodical reports and about the employee being informed on time in writing about confirmation/extension of the period of probation, as far as possible.

13. To substantiate this contention, reference is made to *Sukhdev Singh v. Bhagatram*, (1974)2 S.C.J.326= (1974)2 S.C.C.213= A.I.R.1974 S.C.1331, which held:

> "24. Broadly stated, the distinction between rules and regulations on the one hand and administrative instructions on the other is that rules and regulations can be made only after reciting the source of power whereas administrative instructions are not issued after reciting source of power. Second, the executive power of a State is not authorised to frame rules under Article 162. This Court held that the Public Works Department Code was not a subordinate legislation (See *G.J.Fernandez v. State of Mysore*, (1968)1 S.C.J. 562= (1967)3 S.C.R.636= A.I.R.1967 S.C.1753. The rules under Article 309 on the other hand constitute not only the constitutional rights of relationship between the State and the Government servants but also establish that there must be specific power to frame rules and regulations."
>
> 33. There is no substantial difference between a rule and regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A regulation framed under a statute applied uniform treatment to every one or to all members of same group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame regulations *inter alia* for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard."

Then reliance is placed on *C.Ramanathan v. Acting Zonal Manager, F.C.I.*, (1980)1 L.L.J.1 which dealt with a transfer of an employee of Food Corporation wherein it was held that guidelines fixed for transfer required to be followed and taking into account the other factors cumulatively, it was held that the transfer was not a fair order. Relying on this decision, it is pleaded that apart from the regulation dealing with transfer, guideline issued was treated as having statutory force. In this decision, there is hardly any discussion as to how far the said guideline could have the same force as that of the Regulations.

14. *Union of India v. K.P.Joseph*, (1974)2 S.C.J.216= (1973)2 S.C.R.752= A.I.R.1973 S.C.303 dealt with the scope of an administrative order issued in the form of a memorandum dealing with the fixation of pay. It was held that "generally speaking, an administrative order confers no justifiable right but this rule, like all other general rules, is subject to exception." After adverting to *Sant Ram Sharma v. State of Rajasthan*, (1968)1 S.C.J.672= (1968)1 S.C.R.111= A.I.R.1967 S.C.1910, which held that wherever rules framed

TRIPATHI PUBLICATIONS

1. **MULLA'S TRANSFER OF PROPERTY ACT.** 7th Edn. Ed. by H.R.Khanna and P.M.Bakshi. 1985. Rs.220.00
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under Article 309 of the Constitution are silent on any particular point, then the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules and that such instructions will govern the conditions of service, and it was also held that there are certain administrative orders, which confer rights and impose duties. When they abridge or take away the rights, then principles of natural justice of *audi alteram partem* enter into the area. Relying upon this decision, it is contended that circulars issued by first respondent are equatable to office memorandum relied upon in this decision. In paragraph 11 of the decision, it has been cautioned that it should not be understood that the Supreme Court was laying down any general proposition on this question. This shows that under the peculiar circumstances of the said case, it was considered that the said memorandum would be binding upon the Union of India. There is nothing to indicate in the circulars that they have been issued exercising powers under Rule 91.

15. Yet another decision relied upon is *State of Uttar Pradesh v. Chandra Mohan*, (1977)4 S.C.C.345= (1977)3 All L.R.673= (1977) Lab.I.C.1923= (1978)1 S.C.R.521= A.I.R.1977 S.C.2411. Supreme Court took the view that when certain guidelines are prescribed regarding premature retirements, then any non-compliance of the said guidelines would confer a right upon the Government servant to rest upon such guidelines and secure relief, because they fill up the yawning gaps in the rules, as to what procedure should be adopted in compulsorily retiring a Government servant.

16. Mr.Govind Swaminathan, learned Counsel for the petitioner, placed considerable stress upon this decision also to plead that the circulars relied upon prescribed the methodology to be adopted for considering how far the probationer had satisfactorily discharged his duties. This Court considers that a bunch of these circulars cannot be treated as justiciable orders, for more than one reason. It is always beneficial to service personnel to have definiteness regarding their service conditions. Piecemeal and indefinite changes affected by periodical circulars, would make it impossible for a clear comprehension of the rule, that would be applicable and it would bring about an unsettled situation resulting in ambiguity and no cogent application of rules. As held by the Supreme Court, administrative directions can fill up the gaps in the rules because they speak and do vitative service in a vacuous field, but at the same time it must be established that the administrative order or instruction or circular has resulted in a stable principle emerging out of such circulars, and which is not inconsistent with the rules or regulations or the provisions of the Act. As pointed out above, Circular Nos.3-6/73 dated 31.8.1973 and Circular No.16 dated 16.6.1967 contain a provision which is opposed to R.15. Further, none of the circulars even claim that they have been issued under Rule 91. It is not as if only by invoking a rule or regulation, its binding nature could be made out, this would be one of the indications to distinguish it from general orders or instructions issued for guidance. Thirdly, there is nothing to decipher that any unoccupied field is dealt with in the circulars. R.15 states that the period of probation would be for one year in the first instance and can be extended for one more year. During these periods, undoubtedly, the evaluation will have to be made about the performance of the incumbent. The circulars only spell out as to how these assessments could be made. To bring about co-ordination and identical approach to be made all over the country, there would be need to issue endless instructions to the concerned authorities from time to time, as to how best the existing procedures could be further modified, altered or amended etc., and such directions which are more of procedural nature, cannot be treated as justifiable and enforceable orders, when without all these circulars, the assessment of work of a probationer could be made under R.15. Therefore, it is not an unoccupied field, wherein the circulars have stepped in to fill up the gaps. This Court considers that the circulars are purely administrative instructions, to bring about uniformity, and from time to time they have been issued to streamline the procedure for preparation of probationary reports and for early decisions

to be taken. Undoubtedly, non-compliance of such circulars would entail disciplinary action against the competent authority. But such an indication therein would not upgrade the circulars to equate them to the position of regulations and make them enforceable orders.

17. It is pointed out that in circulars dated 31.8.1973 and 16.6.1977, reference is made to R.15, and therefore, they have been issued under the said regulation read with R.91. R.15 does not empower framing of any rules or instructions thereunder. It is only R.91 which enables the Board to issue general instructions not inconsistent with the Act, the rules and regulations, for the purpose of removing such doubt, difficulty, lacuna, for applying R.15 and the circulars have only prescribed the methodology for assessing the suitability and nothing more. Hence, the regulations do not deal with a vacuous field for being treated as justiciable and enforceable orders.

18. It is then contended that, when certain opportunities are extended in circulars to a probationer by being put on notice about his unsatisfactory performance from time to time, and to improve his performance and when such opportunities had not been extended, he has the justiciable right to seek for relief by invoking Article 226 of the Constitution. This contention overlooks the essential features relating to probation, and more so, of what is provided under R.15(3). In respect of a promotee, he can be reverted to a lower post without notice and without assigning any reason. Such is the scope of the regulation. If any refinement had been conceived of in enforcing the regulation, and if there is any non-compliance of the internal circulars, then persons responsible for the same would be proceeded against departmentally. Any non-compliance of procedural aspects by the competent authority, would not in turn confer a right on a probationer to seek for extension of probation as attempted to be made in this case. There has been a delay of nearly 8 months in ordering extension of probation, which would be contrary to circular, but in the light of what has been held by Supreme Court, when a person is continued as a probationer beyond the initial period, it has to be deemed that he continues to be on probation. When such is the legal effect, and enforceable regulations having not contemplated anything different, the circulars which aim at certain efficiency to be achieved in assessing probation, cannot confer an enforceable and justiciable right in the probationer to claim that he should be continued in probation because he had not been informed within 4 weeks from the date of completion of probation or that the first half-yearly and the other half-yearly reports have not been sent to him within time. It is claimed that when disciplinary proceedings are contemplated for non-compliance of such circulars, it shows that they will have to be meticulously followed, failing which the affected person would have legal right to claim for continuance of probation. Merely because the superior authority may be subjected to disciplinary proceedings, it does not mean that the circulars could be placed at higher parlance than what they deserve. It is for the first respondent not to belittle the omission committed by the concerned person in not complying with the circulars, and if it is to avoid onslaughts of this nature against it, it should take the disciplinary proceedings, which it spells out in the circulars and firmly punish the persons, who have failed to communicate the reports to the petitioner in time, if it is established.

19. Hence, when the circulars relied upon by the petitioner are not justiciable and enforceable orders, the writ petition is dismissed with costs. Advocate's fee fixed at Rs.250/-.

B.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S. Nainar Sundaram, J.*

*C.R.P.No.888 of 1983. 25th *April*, 1985.

A. Palanivel Chettiar *Petitioner**

v.

R. Elumalai *Respondent.*

Civil Procedure Code (V of 1908), sections 151 and 152 - Amendment of decree after full satisfaction is entered - Held cannot be made.

Once a decree gets fully satisfied and discharged, the decree becomes extinct and dead so far as the Court is concerned, and unless there is scope for resuscitating the same in accordance with law and it gets resusciated as such, neither the party could seek nor the Court could indulge in any amendment of such a decree which has become *nonest* in the eye of law. *[Para.3]*

Amendment pre-supposes the existence of a decree, which is found to be incorrect or infirm or which is irreconcilable with the judgment and on those grounds, or on some other analogous ground amendment is sought for. But when the decree as it stood has become extinct and dead in the eye of law by full satisfaction and discharge of the same, the court will lack jurisdiction to order amendment of such a decree. It would be a different matter if by due process of law, the recording of full satisfaction is nullified and the decree stands resuscitated. The question is not one of the scope of the wide powers of court to order amendment. The question is as to when the power is available and is to be exercised. Courts are not vested with powers to exercise them inexpediently leading to incongruous results. *[Para.3]*

The only remedial measure that may be resorted to is to have the order recording full satisfaction of the decree set aside and deleted by any process known to law and have the decree resuscitated and then only seek the amendment. Hence, the power of amendment of a decree, however wide it may be, is not to be exercised, without circumspection, unheedful of the factors which have intervened, making it inexpedient to order the amendment. *[Para.3]*

Even if it a matter to be investigated in the course of execution proceedings, it should be done before the execution terminates in the discharge of the decree. But after the execution has been closed on the ground that the decree itself has been satisfied, even the matters relating to execution of the decree as such could not be reopened. *[Para.4]*

Unless the decree recording full satisfaction stands deleted, it is not possible to indulge in an amendment of that decree because on the one hand there will be an order which has wiped out the decree as such and on the other there will be another order which purports to carry out amendments which order will be a nullity. *[Para.12]*

Khudu Mahto v. Bhim Mahto, A.I.R.1950 Patna 183 and *Benche Lal v. Hem Singh*, A.I.R.1953 All 485, dissented from.

Cases referred to:-

Hatton v. Harris, (1892) A.C.547; *Piraratna Unnanse v. Maharkee Sonuttara Unnamse*, (1950) All.L.J.587 (P.C.); *Fakruddin Mahomed Arsan v. The Official Trustee of Bengal*, I.L.R. (1884) 10 Cal.538; *Pathan Bi v. Mytheen Bibi*, (1902) 12 M.L.J.96; *Pittam Lal v. Balwant Singh*, A.I.R.1925 All 556; *Munusami Pillai v. Mahdi Hussain*, (1926) 50 M.L.J.655: A.I.R.1926 Mad.516; *Khudu Mahto v. Bhim Matho*, A.I.R.1950 Pat.183; *Benche Lal v. Hem Singh*, A.I.R.1953 All.485; *Jai Narain v. Chheda Lal*, A.I.R.1960 All.385; *Shyamal Bihari v. Girish Narain*, A.I.R.1962 Pat.116; *Narayanadas v. Vishnu*, A.I.R.1963 M.P.158.

S. Desikan, for Petitioner.

M.N.Sundararajan, for Respondents.

The Court made the following
ORDER:- The judgment-debtor, defendant

in O.S.No.250 of 1975 on the file of the District Munsif, Coimbatore, is the petitioner in this revision. The decree-holder, plaintiff in the suit, is the respondent herein. A money decree was passed on 19th December, 1978. On 19th August, 1982, in E.A.No.1507 of 1982, full satisfaction of the decree was recorded. On 21st August, 1982, the decree-holder took out an application, I.A.No.3471 of 1982 to amend the decree to incorporate the award of interest at the rate of 9 per cent per annum from 29th May, 1972 to 19th December, 1978 and thereafter at the rate of 6 per cent per annum and to include costs of Rs.267. This application has been allowed by the Court below following a pronouncement of a single Judge of the Patna High Court in *Shyamal Bihari v. Girish Narain*, A.I.R. 1962 Pat.116. This revision is directed against the orders of the court below.

2. Mr. S.Desikan, learned Counsel for the judgment debtor, would submit that once full satisfaction has been entered, the decree becomes extinct, the Court becomes *functus officio* so far as that decree is concerned and thereafter, it is not competent to ask for an amendment of the decree in the manner aksed for by the decree-holder. As against this, Mr. M.N.Sundararajan, learned Counsel for the decree-holder, would submit placing reliance on the pronouncement in *Shyamal Bihari v. Girish Narain*, A.I.R.1962 Pat. 116, that the powers of the court for amendment of a decree under section 152, C.P.C. are wide and the court will not become *functus officio* with regard to its powers of amendment of decree even though there has been a full satisfaction thereof earlier.

3. The contentions raised by the learned counsel oblige me to make an analysis of the available case law on the subject to find out the correct principle to be applied in contingencies as in the present case. Once a decree gets fully satisfied and discharged, the decree becomes extinct and dead so far as the court is concerned, and unless there is scope for resuscitating the same in accordance with law and it gets resuscitated as such, neither the party could seek nor the Court could indulge in any amendment of such a decree which has become *nonest* in the eye of law. This appears to me to be the basic principle, which should govern the question of amendment of a decree. When the decree has been wiped out by the full satisfaction and discharge of the same, where is the question of amending it? Amendment presupposes the existence of a decree, which is found to be incorrect or infirm or which is irreconcilable with the judgment and on those grounds, or on some other analogous ground amendment is sought for. But when the decree as it stood has become extinct and dead in the eye of law by full satisfaction and discharge of the same, the Court will lack jurisdiction to order amendment of such a decree. It would be a different matter if by due process of law the recording of full satisfaction is nullified and the decree stands resurrected. The question is not one of scope of the wide powers of court to order amendment. The question is as to when the power is available and is to be exercised. Courts are not vested with the powers to exercise them inexpediently leading to incongruous results. To touch and reopen a decree to have the desired amendments incorporated in it, at the instance of a party after the decree has become fully satisfied, discharged and wiped out will certainly lead to incongruous results. The processes which already got completed and rights which accrued thereunder on the basis of the unamended decree will have to hang in the air and a fresh process on the basis of the amended decree may be resorted to, to the prejudice and chagring of the party concerned. In the words of Lord Watsor in *Hatton v. Harris*, (1892) A.C.547.

> "When an error of that kind has been committed it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, in correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce."

The intervention could be the very full satisfaction and discharge and thereby

the extinction of the decree and apart from the question there is no decree in the eye of law to have it amended, it would be also inexpedient to indulge in amendment. The only remedial measure that may be resorted to is to have the order recording full satisfaction of the decree set aside and deleted by any process known to law, and have the decree resuscitated and then only seek the amendment. Sir John Beaumount in *Pirara-tna Unnanse v. Maharkee Sonuttara Unnanse*, (1950) All L.J.587 (P.C.) observed:

> "... the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass."

Hence, the power of amendment of a decree however wide, it may be, is not to be exercised, without circumspection unheedful of the factors which have intervened, making it inexpedient to order amendment.

4. Even if it is a matter to be investigated in the course of execution proceedings, it should be done before the execution terminates in the discharge of the decree. But, after the execution has been closed on the ground that the decree itself has been satisfied, even the matters relating to execution of the decree as such could not be reopened. Such a ratio has been countenanced in *Fakruddin Mahomed Arsan v. The Official Trustee of Bengal*, I.L.R. (1884) 10 Cal.538. The learned Judges observed that if a judgment-debtor desired to show that more money has been levied from him under the execution than was due from him under the decree, the only course open to him was to apply for a review of the order and have the execution proceedings struck off. In *Pathan Bi v. Mytheen Bibi*, (1902) 12 M.L.J.96 it has been countenanced that an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction.

5. In *Pittam Lal v. Balwant Singh*, A.I.R.1925 All 556 in concurring with Sulaiman, J. who constituted the Bench along with him, Daniels, J. observed:

> "When a decree for money has been finally satisfied and discharged the court is *functus officio* and can no longer entertain any application for amendment. under section 152, C.P.Code."

6. In *Munusami Pillai v. Mahdi Hussain*, (1926)50 M.L.J.655= A.I.R.1926 Mad.516 Spencer, J. adverted to the above pronouncements and countenanced that the court would be justified in making a correction which involves the payment of a larger sum of money by one party to another, long after satisfaction has been recorded and when nothing remains to be done and the decree has become dead.

7. There are pronouncements of other High Courts, which have taken a contrary view, and I shall refer to them. In *Khudu Mahto v. Bhim Mahto*, A.I.R.1950 Pat. 183 a decree for partition had been passed on the basis of the Commissioner's report, and, after the decree, possession was delivered to the parties on the basis of Commissioner's report which was a part of the decree. The plaintiff of that suit, thereafter, filed an application under sections 151 and 152, C.P.Code for an amendment of the decree on certain grounds. The application was rejected by the Subordinate Judge mainly on the ground that the decree had already been executed. The said order was reversed by the High Court. Narayan, J. held that the fact that the decree had been executed is of no importance so far as the question as to whether the amendment prayed for should be allowed or not is concerned, that the amendment ought to be allowed if it is fit to be allowed in view of the provisions of sections 151 and 152 of the Code, it being another matter as to how the plaintiff will proceed so far as the execution is concerned after the amendment prayed for is made. With respect to the learned Judge. I am not able to express my concord to this view of his that the Court could be oblivious to the factual and the legal consequences of the decree standing discharged and wiped out.

8. In *Benche Lal v. Hem Singh*, A.I.R. 1953 All.485 there was a discrepancy between the judgment and the preliminary decree with regard to the nature of the rights to be sold; the final decree was prepared as per the preliminary decree, execution was levied, properties were sold and purchased by the decree-holders themselves, who certified full satisfaction of the decree and further possession was delivered to them. Agarwala, J. declined to interfere with the order allowing amendment and meeting the contention that after a decree has been satisfied, the Court becomes *functus officio* the learned Judge observed:

> "As regards the contention that, after a decree is satisfied, the court becomes '*functus officio*' it may be conceded that, after a decree has been executed and satisfied, there is an end, of the decree in the sense that nothing more remains to be done by way of execution and the court is '*functus officio*' in the sense that having executed the decree, it has nothing more to do and its authority is at an end. But the authority. which is so terminated is the authority to execute the decree and not the authority to correct accidental slips and errors or to review its own orders."

I express my inability to follow the above reasoning of the learned Judge, because I do not find advertence to the aspect that by full satisfaction and discharge of the decree, the decree has become dead.

9. In *Jai Narain v. Chheda Lal*, A.I.R. 1960 All.385, S.S.Dnavan, J. chose to adopt the ratio of Agarwala, J. in preference to that of Daniels, J. in the Division Bench case of the same High Court in *Pittam Lal v. Balwant Singh*, A.I.R.1925 All.556.

10. In *Shamal Bihari v. Girish Narain*, A.I.R.1962 Pat.116 Rah Kishore Prasad, J. dealt with a case where the application for amendment of the decree was made before the execution case was dismissed on full satisfaction and the decree became dead and, as a matter of fact, the plaintiff took the objection at the execution stage itself that unless the decree was amended, it could not be executed and it was only after rejection of his objection that he made the application for amendment of the decree, and on that date when it was made, the execution case was pending. The pronouncements in *Pittam Lal v. Balwant Singh*, A.I.R.1926 All.556 and *Munusami Pillai v. Muhdi Hussain*, (1926)50 M.L.J.655= A.I.R.1926 Mad.516 were adverted to by the learned Judge and distinguished from the facts of the case dealt with by him in the following terms:

> "It will, therefore, appear from the above discussions, that the two cases relied upon by Mr.Mustafi are of no assistance to him in the present case, for the simple reason that, in each of the above cases, the decree, of which the amendment was sought for had been fully satisfied and had become dead long before an application for its amendment was made but, here, the application for amendment of the decree was made when the decree under execution could not be said to be dead, but was quite alive, in that the sale in execution of the said decree, although held earlier had not been confirmed till then, and the execution case was then pending as it was dismissed on full satisfaction thereafter.". (page.119)

The above observations do indicate that the Judge is countenancing the position that if a decree has been fully satisfied, it would become dead and an application for amendment taken thereafter may not be competent.

11. In *Narayanadas v. Vishnu*, A.I.R.1963 M.P.158 V.R.Newaskar, J. dealt with a case where the correction was sought on the ground of clerical mistake in the decree of the trial court, which had persisted in the decree in the second appeal. In the decree of the trial court, the date of the decision of the Rent Controller's court was mentioned as 22nd December, 1953 when factually it was only 22nd December, 1952, and that was not disputed. The learned Judge preferred

to follow the ratio in *Khudu Mahto v. Bhim Mahto*, A.I.R.1950 Pat.183 and *Bechelal v. Mem Singh*, A.I.R.1953 All.485.

12. The facts of the present case are different. On the date when the application for amendment was made, the decree stood fully satisfied and had become dead. Unless that order recording full satisfaction stands deleted in any manner known to law and the decree resuscitated, it is not possible to indulge in an amendment of that decree, because on the one hand there will be an order which has wiped out the decree as such and on the other, there will be another order, which purports to carry out amendments which order, as countenanced by this Court in *Pathum Bi v. Mytheen Bibi*, (1902) 12 M.L.J.96 will be a nullity. I should not be understood to have expressed any opinion on merits with regard to setting aside the order recording full satisfaction. Admittedly no step has been taken in this behalf, and no proceeding arising therefrom is before me. When there is no decree on the file of the Court below and which has been completely wiped out by recording full satisfaction thereof, there is no question of amending the decree as such. My assessment of the legal position obliges me to follow the principle which I have already expressed above and in this, I find that I have the support of the authorities of this Court itself. In this view, I am not able to follow and adopt the ratio of other High Courts, which have expressed a contrary view.

13. There is another aspect which also I must take note of and that is, it does not appear to be the claim of the plaintiff that the judgment in fact awarded the reliefs which he sought to introduce by way of amendments. That is a matter which would become relevant and germane only in case there could be competent proceedings, so as to effectuate the amendment. But the proceedings taken out themselves were incompetent and without jurisdiction and hence, there is no need to go into this question. In view of the above position, I am not able to sustain the orders passed by the court below and accordingly the revision is allowed. But, there will be no order as to costs.

B.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.N.Chandurkar, C.J.*

*C.R.P.No.2999 of 1983.

26th February, 1985.

K.Janakiraman *Petitioner**

v.

Hajee Abdul Sattar and another

Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14(1)(b) - Applicability - Building being dilapidated and decrepit not the only ground for directing tenant to deliver possession - Bona fide requirement of landlord for putting up him own residential building - Permissibility.

Undoubtedly a building dilapidated and decrepit could be one of the grounds on which the landlord could seek eviction of the tenant under section 14(1)(b) of the Act. But such a case is not exhaustive of the applicability of section 14(1)(b). There could be a case where a landlord may purchase a small structure with open land which is occupied by a tenant with the express intention of putting up his own residential building and the mere fact that the building already existing is neither dilapidated nor unsound would be no ground for rejecting the claim of the landlord if he otherwise satisfied the Rent Control Authority about his *bona fide* requirement.

[Para.3]

The High Court has consistently taken the view that the decrepit or dilapidated condition of the building is not the only ground on which a petition under section 14(1)(b) of the Rent Control Act can be made. *[Para.4]*

Cases referred to:-

Metalware and Company v. Bansilal, (1980)1 M.L.J. (S.C.)1 : (1979)2 S.C.J.377: (1979)3 S.C.C.398: (1979)2 R.C.J.452. A.I.R.1979 S.C.1559; *Bharat Trading Company v. K.Shanmughasundaram*, (1982)1 M.L.J.94: (1982) 95 L.W.259; *Mahboob Badhsha v. Manga Devi*, (1965)2 M.L.J.209: 78 L.W. 286; *Arumugham v. D.Srinivasan*, (1982) 95 L.W.238.

Mangai Mannan, for Petitioner.

N.Sivamani, for Respondents.

The Court made the following

ORDER:- This is a tenant's revision petition challenging the concurrent findings of both the Rent Control authorities that the premises in occupation of the tenant are *bona fide* required by the landlord for the immediate purpose of demolishing it and that the landlords want to erect a new building on the site of the old building. The petitioner is one of the three tenants who are in occupation of a portion of the premises which have been purchased by the landlords in 1979. The premises are undoubtedly used for non-residential purposes but the landlords who are father and son want to construct residential premises at the site of the present building. They have already got a plan sanctioned from the Corporation on 1st April, 1981. It is not in dispute that they are will-to-do people and are possessed of necessary amount of Rs.1,50,000 required for demolition and reconstruction. The stand taken by the tenant petitioner was that the building is quite strong and it does not need to be demolished. The rent control proceedings, according to the tenant, were the result of the tenant not agreeing to pay a higher rent. The Rent Controller on a consideration of the evidence found that the building itself is more than 70 years old and that the landlords whose annual turnover of their business is more than Rs.50 lakhs *bona fide* wanted the premises to be demolished and a new building put up for residential purposes, and even the planning permit valid upto 31st March, 1984 had been obtained by the landlords. Having found that the requirement of the landlord was *bona fide*, an order of eviction was made against the tenant.

2. In an extensive and exhaustive order considering the contentions raised by the tenant in the appeal filed by him, the appellate authority confirmed these findings. These findings are now challenged by the tenant. Relying on the decision of the Supreme Court in *Metalware and Company v. Bansilal*, (1980)1 M.L.J. (S.C.) 1= (1979)2 S.C.J.377= (1979)3 S.C.C.398= (1979)2 R.C.J.452= A.I.R.1979 S.C.1559= 92 L.W. (S.C.) 32 (S.N.) in which the Supreme Court has held that the existing condition of the building is a vital factor while considering the *bona fide* requirement of the landlord and that the age and the question whether the construction is a recent reconstruction or an old one and whether it is in good and sound condition or it has become decrepit or dilapidated are all relevant factors forming part of all the circumstances that have to be considered while determining the *bona fide* requirement of the landlord, the learned counsel for the tenant has contended in this case that the landlord has not come to court with a plea that the building is old and needs demolition and, therefore, the landlord's petition should have been rejected. But, the facts of the case before the Supreme Court would show that the landlord in that case had positively come to Court with a case that the building is very old and dilapidated and required immediate demolition and reconstruction. Admittedly in the instant case dilapidated condition of the building is not a ground on which the landlords have asked for eviction of the tenant. They have come to court with a very clear case that in the place of non-residential building they want to construct residential premises for themselves and that they have purchased the property explicitly with such an intention. It is not the case of the tenant that this claim of the landlords that they

want to construct a building for their residential use is merely a device to evict the tenant. As has been found by both the authorities, the landlords are possessed of sufficient means, they have already taken steps for the demolition and the construction of a new building inasmuch as they have got a plan sanctioned and have also got a planning permit. On these facts, it is difficult to see how the landlords will not be entitled to the benefit of section 14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

3. Section 14(1)(b) provides that notwithstanding anything contained in the Act, but subject to the provisions of Sections 12 and 13, on an application made by a landlord, the Controller shall, if he is satisfied that the building is *bona fide* required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date. Undoubtedly a building being dilapidated and decrepit could be one of the grounds on which the landlord could seek eviction of the tenant under section 14(1)(b) of the Act. But such a case is not exhaustive of the applicability of section 14(1)(b). There could be a case where a landlord may purchase a small structure with open land which is occupied by a tenant with the express intention of putting up his own residential building and the mere fact that the building already existing is neither dilapidated nor unsound would be (sic) no ground for rejecting the claim of the landlord if he otherwise satisfied the Rent Control Authority about the *bona fide* requirement.

4. The decision of the Supreme Court referred to earlier was considered by this Court in *Bharathi Trading Company v. K.Shanmughasundaram*, (1982) 95 L.W. 259= (1982)1 M.L.J.94. The learned Judge has in that case taken the view, that the terms of section 14(1)(b) are wide enough to cover cases where the landlord *bona fide* required the building for the expansion of his own business or for legitimate purposes. This view has my respectful concurrence. It appears that this Court has consistenly taken the view that the decrepit or dilapidated condition of the building is not the only ground on which a petition under section 14(1)(b) of the Rent Control Act can be made. See *Mahboob Badhasha v. Manga Devi*, (1965)2 M.L.J.209= 78 L.W.286 and *Arumugham v. D.Srinivasan*, (1982) 95 L.W.328. Having regard to this consistent view on the construction of section 14(1)(b), it is difficult to find any infirmity in the view taken by both the Rent Control Authorities. This revision petition is therefore dismissed. There will, however, be no order as to costs.

5. The learned Counsel for the tenant has requested for some time for the tenant to vacate the premises. Since the tenant has been carrying on business in this premises for a long period of time, in the interests of justice. I consider it will be proper to give the tenant four months' time to vacate the premises provided he files an undertaking to this Court that he will vacate the premises on or before 1st of July, 1985 and in the meantime continue to pay to the landlords an amount equal to rent and he will not be entitled to a new tenancy in his favour. The undertaking is to be filed within a week from to-day. If the undertaking is not so filled, the landlords would be entitled to execute the decree for eviction.

B.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S. Nainar Sundaram, J.*

*Appeal No.1151 of 1979. 21st *March*, 1985.

Chettimai C. Nanjappa Chettiar (deceased) and another *Appellants**

v.

S.M.Kuppuswami Chettiar and others *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 6 and 70 - Hereditary trusteeship claim - Person entitled to succeed cannot be deprived of his right to succeed by relinquishment or release by predecessor.

According to the Supreme Court the position of a hereditary trustee is that of a Dharmakarta or a mere manager or custodian of a religious institution with an exception namely, that the hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession. *[Para.3]*

Once it is held that succession as of right is available to the office of the hereditary trustee, it is not possible to permit a person in the office for the time being to barter it away for no value so as to stultify and cripple the rule of succession. Such hartering away, release or relinquishment by the person for the time being in office of the hereditary trusteeship will be of no legal consequence and the person who is entitled to succeed can insist and claim his right as a successor, ignoring such release or relinquishment. *[Para.3]*

Cases referred to:-

Kaki Nada Annadana Samajam v. Commissioner of H.R. & C.E., (1971)2 S.C.J. 527: (1972)1 An.W.R. (S.C.)5: (1972)1 M.L.J. (S.C.)5: A.I.R.1971 S.C.891; *Janaki Ammal v. Sanjeevi Chettiar,* (1941)1 M.L.J.510: 53 L.W.290: A.I.R.1941 Mad.552; *Angurbala v. Debabrata,* 1951 S.C.J.394: 1951 S.C.R.1125. A.I.R.1951 S.C.293. 64 L.W.960, *Kalipada Chakraborti v. Palani Bala Devi,* 1953 S.C.J.209. (1953)1 M.L.J. 597: A.I.R.1953 S.C.125: 66 L.W.524; *Janaki Raman, P.D. v. Koshalyananda, P.D.,* A.I.R. 1961 Pat.293.

T.L.Ram Mohan, for Appellants.

C.Ramanathan and V.Nicholas, Govt. Advocates, for 4th Respondents.

The Court delivered the following

JUDGMENT - The plaintiff in O.S.No.13 of 1973 on the file of the Subordinate Judge of Coimbatore, originally preferred this appeal. The original appellant died pending the appeal and his legal representative being his son is on record as the appellant. The respondents in the appeal are the defendants in the suit. The suit was laid under section 70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act 22 of 1959, to set aside the order, dated 13th October, 1972 of the fourth defendant in A.P.No.40 of 1971 and to declare that the plaintiff is the hereditary trustee of the Ellai Chandi Vinayakar Temple in Coimbatore. The entire gamut of the facts need not be set out in this judgment for the simple reason, the controversy has boiled down to a particular aspect as to whether hereditary trusteeship, which was admittedly in existence, was lost by relinquishment as reasoned by the fourth defendant in his order and which has found countenance before the Court below. This appeal is directed against the judgment and decree of the Court below when it dismissed the suit of the plaintiff.

2. The temple is admittedly a public temple. Equally so, it is admitted that the trusteeship of the temple was hereditary. But what has been put against the plaintiff is that from 1902 to 1941, the management of the temple vested with a Committee of Abhimanees, pursuant to a deed executed by the father of the plaintiff and hence, the office of hereditary trustee was renounced and relinquished by the father of the plaintiff and so, it was lost to the plaintiff also. However, Mr. T.L.Ram Mohan, learned

Counsel for the appellant herein, would state that though the father of the plaintiff constituted the Committee of Abhimanees, strictly speaking, there was no relinquishment or renunciation of the office of the hereditary trustee by the father of the plaintiff and in spite of the arrangement, the father of the plaintiff was very much in the picture during his lifetime and after him the plaintiff. Learned Counsel would contend that neither the father of the plaintiff nor the plaintiff ever stood dissociated from the management of the temple and the Committee of Abhimanees got constituted to serve a particular purpose and exigency and in any event, after 1941, the Committee of Abhimanees ceased to exist, and from 1947 onwards the plaintiff in his own right as the hereditary trustee is in management of the temple. In any event, learned Counsel would further submit that once the office is held to be hereditary, there could not be relinquishment of the said office by the person for the time being in office and by that there could not be deprivation of the rights of the persons who are entitled to succeed to the office.

3. It is true, hereditary trusteeship is not properly within Article 19(1)(f) (now deleted) or any other Article of the Constitution. Vide *Kaka Nada Annadana Samajam v. Commissioner of H.R. & C.E.*, (1971)2 S.C.J.527= (1972)1 An.W.R. (S.C.)5= (1972)1 M.L.J. (S.C.)5. A.I.R.1971 S.C.891. In that case, the Supreme Court distinguished the office of hereditary trustee from that of a Shebait of a religious institution, or a Matadhipathi or a Mahant where the ingredients of both office and property, of duties and personal interests are blended together. The Supreme Court countenanced that the position of hereditary trustee is that of a Dharmakartha or a mere manager or custodian of a religious institution *with an exception, namely, that the hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession* (emphasis applied by *Italics*. Once we countenance that succession as of right is available to the office of the hereditary trustee, it is not possible to permit a person in the office for the time being to barter it away for no value, so as to stultify and cripple the rule of succession. Such bartering away, release or relinquishment by the person for the time being in office in the hereditary trusteeship will be of no legal consequence and the person who is entitled to succeed can insist and claim his right as a successor, ignoring such release or relinquishment.

4. In *Janaki Ammal v. Sanjeevi Chettiar*, (1941)1 M.L.J.510= 53 L.W.290= A.I.R.1941 Mad.552 it has been countenanced that an alienation or release or renunciation of office of a trustee not for value in favour of the next or immediate heir is valid and otherwise, it is invalid. In *Angurbala v. Debabrata*, 1951 S.C.J.394= 1951 S.C.R.1125= A.I.R. 1951 S.C.293= 64 L.W.960 it has been countenanced that the general law of succession governs also the right of shebaitship. In *Kalipada Chakraborti v. Palani Bala Devi*, 1953 S.C.J.209= (1953) 1 M.L.J.597= A.I.R.1953 S.C.125= 66 L.W.524 it was held that the shebaitship combines in it both the elements of office and property and it is heritable. In *Janaki Raman P.D. v. Koshalyananda P.D.*, A.I.R. 1961 Patna 293 a Bench of the Patna High Court countenanced that there is no power in a shebait to relinquish his right to the exclusion of his heir. It is true that the case of a shebaitship stands on a stronger footing. But, as pointed out by the Supreme Court in *Kaka Nada Annadana Samajam v. Commissioner of H.R. & C.E.*, (1972)1 An.W.R. (S.C.)5= (1971)2 S.C.J.527= A.I.R.1971 S.C.891= (1972)1 M.L.J. (S.C.)5 the law of succession applies to the office of hereditary trustee also and the hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession. Hence, the rule inhibiting relinquishment or renunciation will apply with equal force to the case of hereditary trusteeship. Mr. V.Nicholas, learned Government Advocate, appearing for the fourth defendant, fourth respondent herein, does not dispute this position in law. If this is so, I am not able to annex any legal significance or implication to the constitution of the committee of Abhimanees in 1902. The case of the plaintiff

is that despite such arrangement, his father continued to be in management till his demise and thereafter the plaintiff took up management. In any event, from 1947 there is no committee at all and the plaintiff is in management of the temple and, according to him he is in such management of the temple as hereditary trustee. The case of the plaintiff that he is in management from 1947 has not been denied in the written statement of the contesting fourth defendant. He merely wanted to sustain his order in which he countenanced relinquishment and surrender of the office of the hereditary trustee by the father of the plaintiff. The evidence placed in the case, if at all, can indicate that during the period 1902 to 1941, there was a committee of Abhimanees. But, it cannot be stated that either the father of the plaintiff or the plaintiff stood dissociated from the trusteeship and management and, on the other hand, they continued to be very much in the picture. From the features disclosed, it is not possible to strictly spell out relinquishment or renunciation of the hereditary trustee. Even otherwise, relinquishment or renunciation of the hereditary trusteeship for no value, as per discussion supra. cannot be countenanced, so as to deprive a person entitled to succeed in the present case the plaintiff of his right to do so. On facts, it has come out that the plaintiff in his right as a successor has come into the office of hereditary trustee. For all these reasons, I am not able to uphold the judgment and decree of the Court below and accordingly, this appeal is allowed; the judgment and decree of the Court below are set aside and the suit of the plaintiff will stand decreed as prayed for. In the circumstances of the case, the parties are directed to bear their respective costs throughout.

5. Mr.C.Ramanathan, learned Counsel appearing for the third defendant, third respondent herein, states that his client and his brothers are also claimants for the hereditary trusteeship and even earlier this Court, in C.R.P.No.2510 of 1974 by order, dated 17th April, 1978 has countenanced that the scope of the statutory suit cannot take in disputes between rival claimants. Taking note of this position, both the plaintiff and the third defendant filed a joint memo before the court below stating that the dispute between the plaintiff on the one hand and the third defendant and his brothers on the other, being rival claimants to the trusteeship, may be left open to be decided in a separate suit and the court below has accordingly left this question open. This position is left undisturbed by this judgment in appeal. In any event, I make it clear that so far as this position is concerned, it stands reiterated and the allowing of this appeal and setting aside of the judgment and decree of the court below and granting relief to the plaintiff need not be construed to have decided one way or the other the rival claims to the hereditary trusteeship as between the plaintiff on the one hand and the third defendant and his brothers on the other.

B.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.N.Chandurkar, C.J.*

*C.R.P.No.3041 of 1984. *19th April, 1985.*

Palaniammal *Petitioner**

S. Periasamy and others *Rsspondents.*

Limitation Act (XXXVI of 1963), section 28 and Article 136 - "When the decree or order becomes enforceable" - Meaning of - Computation of the period of twelve years must be from the date on which the appellate decree is made in case where there is an appeal or there is a further appeal against the decree of the appellate Court.

A reading of Article 136 shows that the period of twelve years which is originally provided for by section 48, C.P.C. is now provided for by enacting Article 136. However while under section 48, C.P.C, this period of twelve years had to be computed from the date of the decree sought to be executed, the phraseology in Article 136 is slightly different. The words used are 'when the decree or order becomes enforceable' instead of 'the date of the decree sought to be executed.' *[Para.8]*

'What has now been done by Article 136 is that section 48, C.P.C. having been repealed, the period of twelve years referred to in section 48, C.P.C. has been brought in under Article 136 and instead of providing different points of time, the points of time covered by items 1 to 4 in column 3 of Article 182 of the Limitation Act, 1908 have been compendiously described as 'when the decree or order become enforceable.' The words 'when the decree or order becomes enforceable' must, therefore necessarily mean that in a case where the decree has been the subject-matter of appeal, whether first appeal or second appeal, then the decree becomes enforceable only when the appellate decree is made. Whenever there is an appeal against the decree of a trial Court, what is enforceable is not the decree of the trial Court but the decree of the appellate Court because the decree of the trial Court gets merged with the decree of the appellate Court even where the appeal is dismissed. *[Para.8]*

The established position that where there is an appeal and the appellate decree supersedes the decree of the trial Court, then it is only the appellate decree which can be executed, cannot be said to have been disturbed in any way by the enactment of Article 136 of the Limitation Act. The words 'when the decree or order becomes enforceable' must be read in the context of the decree which has to be enforced. If the appellate decree alone has to be enforced, then the computation of the period of twelve years must be from the date on which the appellate decree is made in case there is an appeal against the decree of the trial Court there is a further appeal against decree of the appellate Court. *[Para.*

Cases referred to:-

Umayal Achi v. Ramanathan Chettia (1980)1 M.L.J.24: (1979) 92 L.W.5(*U.P.State v. Mohd. Nooh*, 1958 S.C 242: (1958) M.L.J. (Crl.) 197: 1(S.C.R.595: A.I.R.1958 S.C.86; *Bat Nath v. Munui Dai*, (1914) 41 Ind.A 104: A.I.R.1914 P.C.65: 1 L.W.729= M.L.J.1; *Jowad Hussain v. Gendan Sin*, (1926) 53 I.A.197= 51 M.L.J.781= L.W.394= A.I.R.1926 P.C.93; *Krist Chariar v. Mangammal*, (1903) I.L.R. Mad.91 (F.B.); *Nacharammal v. Veerap* (1946)1 M.L.J.128= I.L.R. (1946) M 817= 59 L.W.103= A.I.R.1946 Mad.2 *Kunjammal v. Krishna*, (1953)2 M.L.J.1 66 L.W.558= A.I.R.1954 Mad.170; *S.K.Ye sdasan v. A.Grant*, (1980)2 M.L.J.1 93 L.W.303; *S.P.Choudhury v. S.C. Co.*, A.I.R.1976 Cal.122; *P.Ramachandri v. D.Seshamma*, (1978)2 An.W.R.4 A.I.R.1978 A.P.342.

N.Sivamani, for Petitioner.

S.Sethuratnam, for Respondent.

The Court made the following

ORDER.- The only question which been argued and which arises in revision petition is whether the Execu Petition filed on 11th July, 1983 by decree-holder is barred by limitation.

2. A decree directing the defen to put the plaintiff in possession of suit property was passed in O.S.No of 1963 by the District Munsif's Cc Erode on 27th August, 1964. This de was confirmed by the appellate Court v A.S.No.161 of 1965 filed by the defen was dismissed on 21st December, 1 S.A.No.826 of 1969 filed by the defen was also dismissed on 23rd Decem 1971. A petition under Order 21, r 22 and 35, C.P.C.for execution of decree was filed on 11th July, 1983.

3. Before the executing Court, objection was raised that the decree-hc

was not entitled to execute the decree beyond the period of 12 years from the date of the decree, which according to the judgment-debtor should be taken as 27th August, 1964, which is the date on which the trial court passed the decree. This objection has been negatived by the executing court which directed the legal representatives of the original judgment-debtor to deliver possession of the property by 17th August, 1984.

4. Mr.Sivamani who appears on behalf of the petitioners in this revision petition has contended that the petition for execution must be held to be barred by limitation since it is filed beyond twelve years from the date of the decree of the trial court. He relied on the opening words of Column 3 of Article 136 of the Limitation Act, 1963. Article 136 of the Limitation Act reads as follows

Description of application.	*Period of Limitation.*	*Time from which period begins to run*
(1)	(2)	(3)
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	When the decree of order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place· Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

5. Mr. Sivamani contends that the period of twelve years is required to be computed from the time 'when the decree or order becomes enforceable'. According to him, the decree of the trial Court become enforceable on 27th August, 1964 and, therefore, the petition for execution of the decree should have been within twelve years from that date. The present petition, according to the learned counsel, having been filed beyond the period of twelve years from 27th August, 1964 was liable to be dismissed.

6. The learned Counsel has relied on some observations made in a Division Bench decision of this Court in *Umayal Achi v. Ramanathan Chettiar*, (1980)1 M.L.J.24: (1979) 92 L.W.599. In paragraph 12 of that decision, the Division Bench has observed.

"...The time when a decree or judgment becomes enforceable is from the date when it is pronounced."

Having regard to this observation, according to the learned Counsel, the decree had

become enforceable when the trial court pronounced the order on 27th August, 1984.

7. The limitation for execution of a decree under the Limitation Act, 1908 was provided by Article 182 and the period of limitation was prescribed in the case of the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48, C.P.C. to be three years: or where a certified copy of the decree or order has been registered, six years. In the third column, the time from which the period begins to run was stated as follows:

1. The date of the decree or order, or

2. (Where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or

3. (Where there has been a review of judgment) the date of the decision passed on the review, or

4. (Where the decree has been amended) the date of amendment) or

Article 182 of the Limitation Act, 1908 thus specifically provided that where there has been an appeal, the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal would be the date from which the period of three years would be counted. Section 48, C.P.Code contained a provision that where an application to execute a decree not being a decree granting an injunction has been made no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. We are concerned with sub-section (2) of section 48, C.P.C. Section 48, C.P.Code thus barred an application for execution of a decree after the expiration of twelve years from the date of the decree sought to be executed. When the Limitation Act, 1963 was enacted, section 48, C.P.C. was repealed by Section 28 with effect from 1st January, 1964. The limitation for the execution of a decree (other than a decree granting a mandatory injunction) or order of any civil Court was provided for in Article 136 of the Limitation Act, 1963.

8. The question which arises is, what is the meaning to be given to the words "when the decree or order becomes enforceable" when computing the period of twelve years if the period of twelve years is to be computed from the date of the decree of the trial court even though there is an appeal from the decree of the trial court and there is a further Second appeal to the High Court against a decree of dismissal of the appeal. A reading of Article 136 shows that a period of twelve years which is originally provided for by section 48 is now provided for by enacting Article 136. However, while under section 48, C.P.C. this period of twelve years had to be computed from 'the date of the decree sought to be executed', the phraseology in Article 136 is slightly different. The words used are "when the decree or order becomes enforceable" instead of "the date of the decree sought to be executed". It has to be remembered that when section 48, C.P.C. referred to the date of the decree sought to be executed, these words were used in the context of the provision made in column 3 of Article 182 of the Limitation Act, 1908. The third column of Article 182 of the Limitation Act, 1908 while referring to the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48, C.P.C. 1908 contemplated four different starting points of limitation of three years provided in Clause 2 of Article 182. The period of three years would be counted either from the date of the decree or order, or where there has been an appeal, the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or where there has been a review of judgment, the date of the decision passed on the review, or where the decree has been amended, the date of the amendment

The entry in the third column of Article 182 of the Limitation Act, 1908 covered cases where there was no appeal from the original decree as well as where there was an appeal and there was a final decree or order in the appeal or the appeal was withdrawn or there was an application for review of judgment or where there has been an amendment of the decree. What has now been done by Article 136 is that section 48, C.P.C. having been repealed, the period of twelve years referred to in section 48, C.P.C. has been brought in under Article 136 and instead of providing different points of time, the points of time covered by items 1 to 4 in Column 3 of Article 182 of the Limitation Act, 1908 have been compendiously described as 'when the decree or order becomes enforceable'. The words 'when the decree or order becomes enforceable', must, therefore, necessarily mean that in a case where the decree has been the subject-matter of appeal, whether first appeal or second appeal, then the decree becomes enforceable only when the appellate decree is made. Whenever there is an appeal against a decree of trial court, what is enforceable is not the decree of the trial Court but the decree of the appellate court, because the decree of the trial court gets merged with the decree of the appellate court even where the appeal is dismissed. This is the settled position of law which cannot be disputed.

9. In the decision in *U.P.State v. Mohd. Nooh*, 1958 S.C.J.242= (1958) M.L.J. (Crl.) 197= 1958 S.C.R.595= •A.I.R.1958 S.C.86 the Supreme Court was dealing with the question whether the High Court could exercise its jurisdiction under Article 226 in respect of an order of dismissal of a Police Constable in a departmental proceeding which was made on 20th April, 1948 before the Constitution came into force but a revision application against the order of dismissal came to be decided on 22nd April, 1950 and it was contended on behalf of the delinquent that as the order was passed after the date of the commencement of the Constitution, its validity can be called in question in an application under Article 226. The Supreme Court in paragraph 13 of the said decision observed as follows:

"As we have already observed an order of dismissal passed on a departmental enquiry by an officer in the department and an order passed by another officer next higher in rank dismissing an appeal therefrom and an order rejecting an application for revision by the head of the department can hardly be equated with any propriety with decrees made in a civil suit under the Code of Civil Procedure by the Court of first instance and the decree dismissing the appeal therefrom by an appeal Court and the order dismissing the revision petition by a even higher court, as has been sought to be done by this High Court in this case, because the departmental tribunals of the first instance or on appeal or revision are not regular courts manner by persons trained in law although they may have the trappings of the courts of law. In the next place, while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely for the purposes of computing the period of limitation for the execution of the decree as in *Batuk Nath v. Munni Dai*, (1914)41 Ind.App.104= A.I.R.1914 P.C.65= 1 L.W.729= 27 M.L.J.1, or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain v. Gendan Singh*, (1926)53 I.A.197= 51 M.L.J.781= A.I.R.1926 P.C.93= 24 L.W.394."

10. The position that where there has been an appeal against the decree, it is only the appellate decree which can be executed is thus well-settled.

11. In *Krishna Chariar v. Mangammal*, (1903) I.L.R.26 Mad.91 (F.B.) a Full Bench of this Court has taken the view that under Article 179 of Schl.II to the Limitation Act, 1877 even where only a portion of the decree has been appealed against and a portion has not been the period of Limitation for an application to execute the portion not appealed against runs from the date of the decree on appeal.

12. A Division Bench of this Court in *Nacharammal v. Veerappa*, (1946)1 M.L.J. 128= I.L.R. (1946) Mad.817= A.I.R.1946 Mad.231= 59 L.W.103 had held that where an appellate Court passes a decree it takes the place of the decree of the trial court, and it is the decree of the appellate court only which becomes capable of execution and consequently the period of twelve years under section 48 commences from the date of such appellate decree and not from the date of the decree of the trial Court. The same view is taken in *Kunjammal v. Krishna*, (1953)2 M.L.J. 185= A.I.R.1954 Mad.170= 66 L.W.558 in which the Division Bench has held that where there has been an appeal from the original decree the period of 12 years under section 48 would run from the date of the appellate decree even though the appeal was in respect of a portion of the subjectmatter of the suit and the decree was sought to be executed against persons who were not parties to the appeal.

13. In *S.K.Yesudasan v. A.Grant*, (1980)93 L.W.303= (1980)2 M.L.J.152 it was held that where an appeal is taken from a part of the decree alone, still the appellate decree would be the one in which the whole of the decree appealed against would clearly merge. This was a case where there was a preliminary decree in a partition suit made on 7th September, 1962. Costs were awarded to the plaintiff by the decree. The plaintiff filed an appeal against the preliminary decree. It was dismissed on 14th October, 1970. The plaintiff then filed an execution petition for executing the decree for costs awarded in the preliminary decree. The defendant raised an objection that the execution petition was barred by limitation since 12 years had expired from 7th September, 1962 which was the date of the preliminary decree. This contention having been accepted by the executing court, the plaintiff filed a revision petition. Balasubrahmanyam, J. took the view following *Kunnammal's Case*, (1953)2 M.L.J.185= A.I.R.1954 Mad.170= 66 L.W.558 cited supra that it was only the appellate decree that was capable of execution and the period of limitation for execution would run from the date of the decree of the appellate court.

14. The Calcutta and Andhra Pradesh High Courts have also taken the view that for the purpose of computation of 12 years under Article 136, the limitation must be held to commence from the date of the appellate decree. In *S.P.Choudhury v. S.C. & Co.*, A.I.R.1976 Cal.122 a decree for costs passed by the trial Court on 1st May, 1959 was affirmed by the appellate court with some modification on 7th June, 1962. An application for execution of the decree for costs of the appellate court was filed on 2nd May, 1972. It was held that the decree of the trial court, dated 1st May, 1959 had merged in the decree of the appeal court, dated 7th June, 1962 and the starting point of limitation for application for execution of the decree for costs is the date of the appeal court decree and not the date of the trial court decree. It was held that it was that decree of the Appellate Court alone which can be executed and that decree cannot be said to have become enforceable at any time prior to 7th July, 1962 i.e. the date on which it was passed.

15. In *P.Ramachandraiah v. D.Seshamma*, (1978)2 An.W.R.445= A.I.R.1978 A.P.342 a Division Bench of the Andhra Pradesh High Court has taken the view that Article 136 substantially reproduces the repealed Section 48, C.P.C. and replaces Article 182 of the old Limitation Act, and Article 136 must be interpreted in the light of the repealed section 48, C.P.C. The Division Bench took the veiw that the meaning of the words "from the date of the decree sought to be executed" in section 48, C.P.C. and the words "where the decree or order becomes enforceable" in Article 136 is practically the same. In paragraph 10 the Division Bench observed as follows:

> "...When the Legislature enacted Article 136 by omitting section 48, C.P.C. and reproducing it in Article 136, we have to take it that they must have been aware of the interpretation of section 48 by the Courts and approved of it. Consequently, we hold that under Article 136 of the present Limitation Act, the

period of limitation can be reckoned from the date of the appellate decree even though there was no stay in the appeal. If there is an appeal, the decree that can be enforced is that of the appellate Court, and the period of Limitation has to be reckoned from the date of that decree..."

16. The observations relied upon by Mr.Sivamani from the decision in *Umayal Achi v. Ramanathan Chettiar*, (1980)1 M.L.J.24= 92 L.W.599 cannot be read as meaning that even in a case where there is an appeal against the decree of the trial Court, the limitation would commence from the date of the decree of the trial court. The observations in paragraph 12 of the said decision that 'the time when a decree or judgment becomes enforceable is from the date when it is pronounced' will be equally applicable to a decree in appeal. The established position that when there is an appeal and the appellate decree supersedes the decree of the trial court, then it is only the appellate decree which can be executed, cannot be said to have been disturbed in any way by the enactment of Article 136 of the Limitation Act. The words "when the decree or order becomes enforceable" must be read in the context of the decree which has to be enforced. If the appellate decree alone has to be enforced and executed, then the computation of the period of twelve years must be from the date on which the appellate decree is made in case where the is in appeal against the decree of the trial Court or there is a further appeal against the decree of the appellate Court.

17. There is thus no substance in the argument of Mr.Sivamani that the petition for execution of the decree must be held to be barred by time.

18. Accordingly, the revision petition is dismissed. No order as to costs.

B.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.N.Chandurkar, C.J.*

*C.R.P.Nos.4256 and 4257 of 1983.
13th July, 1984.

Presentation Convent by its Mother Superior *Petitioner**

v.

Corporation of Madras by its Commissioner Madras - 3 *Respondent.*

Madras City Municipal (Corporation) Act, 1919 (IV of 1919) - Rule 15(a) and (b) of Schedule IV of the Act - Appeal from the Taxation Appeals Committee of Corporation - Notice of intention to appeal not given in time - Power of the Court of Small Causes to condone the delay.

As to whether the Small Causes Court, Madras can in an appeal against the decision of the Taxation Appeals Committee, condone the delay in issuing a notice of intention to appeal required to be given to the Commissioner within ten days from the date on which such decision was communicated by registered post under Rule 15(a)(i) of Schedule IV of the Madras City Municipal (Corporation) Act, 1949,

Held:- Rule 15 puts a fetter on the power of the Court to which an appeal lies under that Rule in the matter of hearing of the appeal. It lays down certain conditions, the satisfaction of which is necessary before the Court can proceed to hear the appeal. The words used in the Rule are "no such appeal shall be heard by the said Court, unless - - - -". On the very terms of Rule 15(a) it is clear, that it is of a mandatory character and one of the conditions which is required to be satisfied before the Court can hear the appeal is not only that a notice of intention to appeal should be sent, but that it should be sent within the period prescribed by clause (i). Clause (ii) computes the period of limitation for filing the appeal from the date on which the decision of the Taxation Appeals Committee has been

communicated. It is obvious that the clear purpose of making this provision was to have an expeditious disposal of the appeal. Except with the leave of the Court, the scope of the appeal is limited by the grounds of appeal communicated in the notice of intention to appeal within the prescribed time. It is a period specified in the statute. *[Para.6]*

It is also significant to note that clauses (b) and (d) of Rule 15 make specific provision with regard to certain matters of limitation. There is express power given in clause (b) to condone the delay in the presentation of the appeal which means that a delay beyond the period prescribed in Rule 15(a)(ii) can be condoned. Clause (e) makes applicable to the appeals under Rule 15, the provisions of Parts II and III of the Indian Limitation Act, 1908, that is sections 3 to 24. Rule 15, therefore is a self-contained Code dealing with limitation and the power of the Court to condone delay in specified cases. By no stretch of imagination a delay in issuing the notice of intention to appeal required to be given under Rule 15(a)(i) can be treated on the same basis as the delay in the presentation of the appeal. Therefore the scheme of Rule 15 is, firstly there is no express power of overlooking the delay in sending the notice of intention to appeal; secondly, there is an express provision with regard to limitation in the matter of presentation of appeal and thirdly, the most important of all, there is an express fetter on the power of the court to decide appeals which do not comply with the procedural formalities prescribed in Rule 15(a)(i) of the Rules. *[Para.7]*

Cases referred to:-

Baburam v. Arjun Lal, A.I.R.1978 All 243, *Ahmed Ali and Company v. Commr., Corporation of Madras*, (1949)1 M.L.J.455: A.I.R.1949 Mad.774. 62 L.W.83.

Petitions under Rule 19-A, Chapter IV of the Madras City Municipal (Corporation) Act, 1919 with Rules read with section 115, Civil Procedure Code, praying the High Court to revise the order of the Court of the Chief Judge, Small Causes Court, Madras dated 15.9.83 and made in P.No.323/83 and M.P.No.301/83 respectively.

Dominique, for Petitioner.

Desabandhu, for Respondent.

The Court made the following

ORDER:- The question which arises in these civil revision petitions is whether the Small Causes Court, Madras, can in an appeal against the decision of the Taxation Appeals Committee, condone the delay in issuing a notice of intention to appeal which is required to be issued to the Commissioner within ten days from the date on which such decision was communicated by registered post under Rule 15(a)(i) of Schedule IV of the Madras City Municipal (Corporation) Act, 1919 (hereinafter referred to as the Rules).

2. The petitioner is a Convent whose property was assessed to municipal tax. The Convent filed the appeals against the order of assessment to the Taxation Appeals Committee under Rule 4 of the Rules. The Taxation Appeals Committee decided the appeal by an order which was received by the Convent on 21.10.1982. It is stated in the affidavits far condonation of delay filed before the Chief Judge, Court of Small Causes, Madras, that the Mother Superior had to leave Madras suddenly as she fell ill and therefore the notice of intention to file an appeal was given only on 18.12.1982, that is, on the next day after the arrival of the Mother Superior at Madras. The delay is thus stated to have been occasioned by reason of illness. Thereafter, there was a further delay of fortyfive days in filing the appeal before the Small Causes Court.

3. The learned Chief Judge, Court of Small Causes, took the view that the appeal could not be heard unless a notice of intention to file the appeal was given within the prescribed period of ten days. The learned Judge also referred to the provision in Rule 15(b) which provides that the Court may for sufficient cause excuse the delay in the presentation of an appeal.

The learned Judge therefore held that when there is an express provision with regard to excusing the delay in the presentation of an appeal and there was no provision for excusing the delay in respect of any other matter, the court could not condone the delay in sending the notice of intention to appeal. The applications for condonation of delay having been dismissed, these civil revision petitions have been filed on behalf of the Convent.

4. It is contended on behalf of the petitioner, on the authority of a decision of the Allhabad High court in *Baburam v. Arjun Lal*, A.I.R.1978 All 243 that in the interest of justice, the court had ample power to condone the delay and that there were several instances is which the Small Causes Court had condoned the delay in the deposit of tax which is required to be made under Rule 15(a)(ii) of the Rules. It is also stated that the Small Causes Court has been condoning the delay even in sending the notice of intention to appeal.

5. Now, the question whether the Small Causes Court had been excusing delays in similar matters or not is not very relevant because the question as to whether the delay in such a case can be condoned or not has to be decided on the terms of Rule 15. Rule 15 of the Rules reads as follows:

> "*Rule 15(a):-* An appeal shall lie to the Small Causes Court against any decision of the Taxation Appeals Committee constituted under rule 14: but no such appeal shall be heard by the said Court, unless -
> (i) a notice of intention to appeal has been given to the Commissioner within ten days from the date on which such decision was communicated by registered post, and
> (ii) the petition of appeal has been presented within fourteen days from the date on which such decision was communicated by registered post and the tax has been paid within the said period.
> ......
> (b) The Court may for sufficient cause excuse delay in the presentation of an appeal.
> (c) The notice of intention to appeal shall state the name, occupation and residence of the appellant or of his attorney or vakil (if any) and the grounds of appeal.
> (d) The appellant shall not, except with the leave of the Court, urge or be heard in support of any ground of objection which has not been set forth in his notice of intention to appeal.
> (e) The provisions of Parts II and III of the Indian Limitation Act, 1908, relating to appeals shall apply to every appeal preferred under this rule."

6. A careful reading of Rule 15 shows that it puts a fetter on the power of the court to which an appeal lies under that Rule in the matter of hearing of the appeal. It lays down certain conditions, the satisfaction of which is necessary before the court can proceed to hear the appeal. The words used in Rule 15(a) are "no such appeal shall be heard by the said court, unless ..." On the very terms of Rule 15(a) it is clear that it is of a mandatory character and one of the conditions which is required to be satisfied before the court can hear the appeal is not only that a notice of intention to appeal should be sent, but that it should be sent within the period of limitation for filing the appeal from the date in which the decision of the Taxation Appeals Committee has been communicated. It is obvious that the clear purpose of making this provision was to have an expeditious disposal of the appeal. As a matter of fact, the notice of intention to appeal is something similar to a notice under section 80 of the Code of Civil Procedure, because in clause (e) of Rule 15, the prescription is that a notice of intention to appeal shall state the name, occupation and residence of the appellant or of his attorney or vakil and the grounds of appeal. There is a further restriction on the scope of the appeal itself. Except with the leave of the Court, the scope of the appeal is limited by the grounds of appeal communicated in the notice of intention to appeal within the prescribed time. I fail to see how in the face of the mandatory words used in Rule 15(a),

the period of ten days can be extended by the court. It is a period specified by the statute.

7. It is also significant to note that clauses (b) and (d) of Rule 15 make specific provision with regard to certain matters of limitation. There is express power given in clause (b) to condone the delay in the presentation of an appeal, which means that a delay beyond the period prescribed in Rule 15(a)(ii) can be condoned. Clause (e) makes applicable to the appeals under Rule 15, the provisions of Parts II and III of the Indian Limitation Act, 1908, that is, sections 3 to 24. Rule 15, therefore, in a self-contained code dealing with limitation and the power of the court to condone delay in specified causes. By no stretch of imagination a delay in issuing the notice of intention to appeal required to be given under Rule 15(a)(i) can be treated on the same basis as the delay in the presentation of an appeal. Therefore, the scheme of Rule 15 is, firstly there is no express power of overlooking the delay in sending the notice of intention to appeal; secondly, there is an express provision with regard to limitation in the matter of presentation of appeal and thirdly, the most important of all, there is an express fetter on the power of the court to decide appeals which did not comply with the procedural formalities prescribed in Rule 15(a)(i) of the Rules. It is therefore very difficult to accept the argument that the court should exercise a power similar to what is exercises while dealing with a matter covered by section 5 of the Limitation Act.

8. Apart from the fact that on the terms of Rule 15(a)(i) no other conclusion seems to be possible, a reference may be made to a Division Bench Judgment of this Court in *Ahmed Ali and Company v. Commissioner, Corporation of Madras*, (1949)1 M.L.J.455: 62 L.W.283= A.I.R.1949 Mad.774 which has been brought to my notice by the learned counsel appearing for the Corporation. The question in that case was whether the Small Causes Court can entertain as appeal wherein the requirement contained in clause (ii) of Rule 15(a) is not satisfied. The Division Bench held that the language of Rule 15 in Schedule IV of the Madras City Municipal (Corporation) Act is imperative and the Court of Small Causes would have no jurisdiction to entertain an appeal unless the requirement contained in clause (ii) of Rule 15(a) is satisfied, namely, payment of tax due under the order appealed against. The same ratio, in my view, would also govern the requirement of Rule 15(a)(i) of the Rules.

9. The decision of the Allhabad High Court relied on by the learned Counsel for the petitioner is, in my view, wholly inapplicable to the facts of the present case. In that case, the learned single Judge has observed that in proceedings under the U.P.Consolidation of Holdings Act although the Civil Procedure Code in its strict sense is not applicable, the analogy laid down in Order 41, Rule 20 would be applicable in view of settled principles of natural justice. In the present case, there is no question of violation of any principle of natural justice. An appeal is a statutory right and it must be exercised strictly in accordance with the conditions laid down by the statute which prescribed the right of appeal. If a right of appeal has to be exercised, it must be exercised in accordance with the provisions of Rule 15 and if Rule 15 lays down certain pre-conditions which should be fulfilled by the appellant, in the absence of any express power in that Rule to dispense with these conditions, the court cannot overlook the fact that those conditions have not been fulfilled.

10. The argument that this is not a case in which no notice of intention to appeal has been issued at all and that this is a case where the notice of intention to appeal has been issued belatedly is not of much substance because if within the period prescribed by the statute for satisfaction of the condition, the condition is not satisfied, the fact that the condition has been satisfied belatedly does not cure the non-compliance with the provisions of the statute. In my view, there is no substance in these petitions. The civil revision petitions fail and they are dismissed. There will be no order as to costs.

R.S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan, J.*

*C.R.P.No.1304 of 1984. 26th July, 1984.

K. Dharmaraj *Petitioner**

v.

A. Narasimhalu and another *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (XXIII of 1973), section 10(2)(i) and section 25 - Concurrent findings of default being wilful - No interference in revision by High Court.

In this case taking all aspects into consideration, the two authorities below have held that the default is wilful and as such the petitioner has to be evicted from the building under his occupation. In *Krishna Reddy v. Vasudevayya*, (1984)1 M.L.J.22 it has been specifically held that the concurrent findings based on evidence shall not be interferred with by the High Court exercising jurisdiction under section 25 of the Act. In this case there is no misconception of the principles to be applied nor any ignorance on the part of the authorities below to advert to such principles nor the authorities below have taken any extraneous or irrelevant factors into consideration to arrive at the decision. *[Para.5]*

Cases referred to:-

Rangaraju v. Parthasarathi, (1964)1 M.L.J. 12; *Govindammal v. Rangaswami Naicker*, (1956)2 M.L.J.69 (S.N.); *Basappa v. Jumnadoss*, (1979)1 M.L.J.317; *Komalam Ammal v. Asoka Cycle and Motor Company*, (1980)1 M.L.J.194; *Khivraj v. Maniklal*, I.L.R. (1966)1 Mad.431: 78 L.W.352: A.I.R.1966 Mad.67; *Krishna Reddy v. Vasudevayya*, (1984)1 M.L.J.22.

N.Thiagarajan, for *P.Ananthakrishna Nair*, for Petitioner.

E.Padmanabhan, for Respondents.

The Court made the following

ORDER: The tenant is the petitioner herein. The respondents filed the petition R.C.O.P.No.29 of 1982 for eviction of the petitioner herein on the ground of wilful default in payment of rent. It is alleged by the respondents in the eviction petition that the petitioner herein occupied the non-residential building bearing D.Nos.372/B, C and D in G.S.T.Road, Pasumalai village. The petitioner became a tenant under the respondents from 1.6.1979 in respect of the petition mentioned building. In respect of building Nos.372/B and C the tenancy was for a period of 3 years from 1.6.1981 and in respect of D.No.372/D the tenancy was for 2 years. The tenancy was according to English Calendar month commencing from the first day of the month ending with the last day and the rent was payable on or before the 5th of every succeeding month. The petitioner agreed to pay Rs.75/- per month in respect of the building in D.No.372/B and C and Rs.80/- per month in respect of building bearing D.No.372/D. A receipt was given every month for payment of rent and for this a 40 pages note book was kept by the petitioner herein. According to the respondents, the petitioner paid rent upto April 1981 and for May 1981 till the date of filing the petition, the petitioner has not paid rent for a period of 13 months. The arrears according to them in Rs.2,990/-. Thus according to the respondents, the petitioner has wilfully and wantonly withheld payment of arrears of rent and committed wilful default in payment of rent.

2. The petitioner herein, in his counter denied all these allegations and said that he had sent the rent of Rs.230/- by money order which is marked as Exhibit B-5 and the same was refused by the respondents herein. The petitioner then deposited the rent into the State Bank, Pasumalai Branch and Exhibit B-4 is the State Bank Pass Book for the same. On 19.3.1981, under Exhibit B-1, the petitioner had sent a sum of Rs.2,530/- demand draft which represented 11 months' rent. Thus according to the petitioner, there is no wilful default on the part of the petitioner herein to warrant his eviction.

3. The two authorities below, after elaborately discussing the evidence and the circumstances in this case came to the conclusion that the petitioner has committed wilful default in payment of rent and as such ordered eviction. It is as against these orders, the present revision petition has been filed.

4. Mr. N. Thiagarajan, the learned Counsel appearing for the petitioner submits that there is no question of wilful default as such arising in this case and hence the orders passed by the authorities below are vitiated and they must be set aside. Mr. Thiagarajan cited a number of decisions for the purpose of establishing his case that there is no question of wilful default as such arising in this case. In *Rangaraju v. Parthasarathi*, (1964)1 M.L.J. 12, Venkatadri, J. has observed that a mere default in payment of rent for a few days will not amount to wilful default and that to hold that a tenant is wilful in payment of arrears of rent, it must be proved beyond doubt that he had exhibited supine indifference and callousness. After setting out this principle the learned Judge held in that case that there was no wilful default as such committed by the tenant since there was only a few days' delay in remitting the rent. In *Govindammal v. Rangaswami Naicker*, (1956)2 M.L.J.69 (S.N.) Basheer Ahmed Sayeed, J. observed that where a landlord refuses to receive or evades the receipt of the rent payable by the tenant, the failure of the tenant to resort to section 6-A of the Madras Buildings (Lease and Rent Control) Act, will not bring the tenant within the mischief of wilful default liable to be evicted. I do not think this decision has any application to the facts of the present case. In *Basappa v. Jamnadoss*, (1979)1 M.L.J.317, Ramaprasada Rao, C.J. has clearly brought out the circumstances under which the tenant must be construed as having committed wilful default by stating that the default as a ground for eviction should be such that it should be so conspicuous to a reasonable person that the tenant's attitude was nothing but supreme indifference and purposeful evasiveness resulting in his recalcitrance. No doubt in that case, on the facts and circumstances that existed, the learned Judge held that there was no wilful default. In *Chithiravadivu Ammal v. Dr. Moses T. Sunder*, (1982) T.L.N. J.57, Fakkir Mohammed, J. has referred to the principles laid down in *Basappa v. Jumnadoss*, (1979)1 M.L.J.317, and on the facts and circumstances of that case, held that there was no wilful default. In *Komalam Ammal v. Ashoka Cycle and Motor Company*, (1980)1 M.L.J.194, Sathiadev, J. on the facts of that case found that the landlady in that case had agreed to receive the rents in a lump sum and when she had so agreed there was no question of wilful default. In *Khivraj v. Maniklal*, I.L.R. (1966)1 Mad.431= 78 L.W.352= A.I.R.1966 Mad.67, Ramamurthi, J. after referring to *Rangaraju v. Parthasarathi*, (1964)1 M.L.J.12 and other decisions, has succinctly stated that wilful default was a state of mind or intention which must be inferred from the totality of circumstances and that mere default by itself would not amount to wilful default and the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rent or reckless indifference. Thus according to the learned Judge, the difference between default and wilful default should be borne in mind before coming to the conclusion that the tenant is liable to be evicted on the ground of wilful default. I have absolutely no hesitation in accepting the principles that have been laid down in the decisions referred to above. We have to consider on the facts and circumstances of the present case as to whether the petitioner herein has committed wilful default or not.

5. In this case P.W.1, in his evidence has specifically stated that he has not received the rent sent under Exhibit B-5 and the endorsement thereon ought to have been made without his knowledge. In Exhibit B-5 which is a money order coupon for Rs.230/- sent on 13.6.1981 there is an endorsement stating that it is refused by the first respondent. The averment in the counter filed by the petitioner herein is specific to the effect that he is in arrears of rent from April, 1981 onwards. From his own statement it is clear that the rent sent under Exhibit B-5 is definitely

beyond the time specified in the agreement to pay rent. Even apart from this fact, P.W.1, has asserted that he did not receive such a money order. Exhibit B-4 is relied on by the petitioner for the purpose of stating that he was depositing the rent in the State Bank since the first respondent has refused to receive the rent. The trial Court has referred to Exhibit B-4 from which it is clear that when 3 months' rent was due, the petitioner herein has deposited only 2 months' rent. So also on 3.9.1981, when 6 months' rent was due, the petitioner remitted only three months' rent. The several withdrawals by the petitioner herein would probablise the contention of the respondents that Exhibit B-4 is only a personal savings account of the petitioner herein and it was not intended to remit the rent due to the respondents. It is only on 19.3.1982 under Exhibit B-1 a demand draft for Rs.2,350/- stating that it represents the arrears for all months was sent. It is subsequent to all these dealings R.C.O.P.No.29/82 was filed on the ground of wilful default for the months from May, 1981 to May, 1982. The facts stated above will clearly reveal that the petitioner has never taken any steps either to address the respondents for the purpose of depositing the rent or to invoke section 8 of the Tamil Nadu Buildings (Lease and Rent Control) Act for depositing the rent into Court. Taking all these aspect into consideration, the two authorities below have held that the default is wilful and as such the petitioner has to be evicted from the building under his occupation. The facts clearly reveal the supine indifference and callousness on the part of the petitioner to pay the rent due to the respondents herein. This aspect of the case has been properly discussed by the two authorities below. In *Krishna Reddy v. Vasudevayya*, (1984) 1 M.L.J.22, Nainar Sundaram, J. has specifically held that the concurrent findings based on evidence shall not be interferred with by this court exercising jurisdiction under section 25 of the Act. In this case, I do not find any misconception of the principles to be applied nor any ignorance on the part of the authorities below to advert to such principles nor the authorities below have taken any extraneous or irrelevant factors into consideration to arrive at the decision.

6. For all these reasons I do not find any merit in the present revision petition and I am in complete agreement with the reasoning of the two authorities below. Accordingly the civil revision petition is dismissed. There will be no order as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan and S.Nainar Sundaram, JJ.*

*Appeal No.592 of 1978.

13 *th February*, 1985.

S.Balasubramaniam *Appellant**

v.

Shamsu Thalreez and others *Respondents.*

Tamil Nadu Agricultural Lands (Record or Tenancy Rights) Act (10 of 1969), section 16-A - Exclusion of jurisdiction of civil Courts - Tenant getting himself registered as a cultivating tenant - Order becoming conclusive and final - Civil Court had no jurisdiction to go into the same matter in a subsequent suit.

On the question of a person getting registered as a cultivating tenant under the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, the jurisdiction of the Authority under the Act is ample enough to decide the controversy relating to the factum of demise, the subject matter of demise the existence of the relationship of landlord and tenant and the propriety, factual and legal, of the demise and such other jurisdictional issues. When the authority constituted under the Tamil Nadu Agriculturists Record of Tenancy Rights Act (10 of 1969) has decided the ultimate question under the Act within his jurisdiction and competency and which he is enjoined to decide in the proceedings under the Act, it is not open to the civil court in a subsequent suit to sit in judgment over the same, as if it is an appellate authority and render a different decision. *[Para.4]*

Case referred to:-

Periathambi Goundan v. The Dist. Revenue Officer, Coimbatore, I.L.R. (1980)2 Mad. 255: (1980)2 M.L.J.89: A.I.R.1980 Mad.180: 93 L.W.169.

G.Subramaniam and *K.Raghunathan,* for Appellant.

T.Vadiveli and *A.A.S.Mustafa,* for Respondents.

The Judgment of the Court was delivered by

Nainar Sundaram, J.:- The first defendant in O.S.No.66 of 1974 on the file of the Subordinate Judge, Tirunelveli, is the appellant in this appeal. The first respondent is the second plaintiff and respondents 2 to 5 are defendants 2 to 4 and 6 in the suit. It must be noted that the original plaintiff died and the second plaintiff got added as his legal representative in the suit itself. The suit was filed for a declaration that the lease claimed by the first defendant is null and void and the first defendant has no right to enjoy and consequently, the relief of possession was also asked for with damages, past and future. The suit was filed on the following allegations: Under the wakfnama dated 20.12.1931, the suit properties were the subject-matter of endowment to Hameem Palli Madarsa Wakf absolutely and the first plaintiff and defendants 2 and 3 are the turn huqdars. The second defendant, without any authority, leased the scheduled properties to the first defendant. The alleged lease in favour of the first defendant is not valid since all the huqdars had not consented for the same and the second defendant alone could not permit the first defendant to enter into and cultivate the suit properties. The sanction of the Wakf Board is lacking. The first defendant is only a trespasser. In O.S.No.15 of 1969 on the file of the Court, below, an order of injunction was obtained against defendants 2 to 4 not to effect any transfer of the suit properties in any manner and subsequently, the suit was decreed, declaring that defendants 2 and 3 are unfit to be the muthavallis. The plaintiffs claimed that on this ground also, the alleged lease is null and void. The first defendant contested the suit stating that the lease in his favour is valid and is for the benefit of the wakf; the second defendant was the trustee of the scheduled properties on the relevant date and he had authority to lease; the litigation in O.S.No.15 of 1969 is irrelevant and could not affect the contractual obligations; the first defendant has been recorded as the cultivating tenant of the scheduled properties by the Record Officer, Tirunelveli and it could not be questioned and assailed by the plaintiff; and further, the claim for damages is not sustainable. We are not very much concerned with the written statement of defendants 2 and 3, who sailed with the first defendant, because we find that they have not prosecuted their defence effectively before the Court below. Defendants 4 and 5 remained *ex parte*. The sixth defendant supported the case of the plaintiff. Reflecting the controversy that arose on the pleadings of the parties, the Court below formulated and set forth the following issues for its decision:

"1. Whether the lease in favour of the first defendant executed by the second defendant is not valid?

2. Whether the plaintiffs are entitled to any amount by way of damages?

3. Whether the first defendant is cultivating tenant as claimed by him?

4. Whether the plaintiffs are entitled to recover possession as prayed for?

5. To what relief are the plaintiffs entitled?"

On issue Nos.1 to 3, the Court below came to the conclusion that the lease in favour of the first defendant, executed by the second defendant, is not valid; the first defendant is not a cultivating tenant, as claimed by him; and the plaintiff is entitled to damages claimed in the suit. As a result, on issue No.4, the Court below held that the plaintiff is entitled to recovery of possession during his term as turn huqdar and granted the plaintiff the decree as prayed for with costs. This appeal is directed against the judgment and decree of the Court below.

2. Mr.G.Subramanian, learned Counsel appearing for the first - defendant - the appellant herein, amongst other contentions, would primarily submit that the first defendant, even as early as 15.1.1978, as per Exhibit B-1 got himself registered as a cultivating tenant under the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act 10 of 1969, hereinafter referred to as the Act, and that order has become conclusive and final for want of further agitation over it under the Act; and even otherwise, the validity of that order has not been challenged specifically by the plaintiff by taking any appropriate pleading setting forth tenable grounds therefor even though this contention has been put forth by the first defendant in paragraph 7 of his written statement, which we shall presently advert to, and the authority constituted under the Act having passed that order, the Civil Court cannot sit in judgment over that order and adjudicate the propriety or otherwise of such an order, as if it is an appellate forum. We find that this submission of the learned counsel deserves acceptance. Irrespective of the other contentions raised by the parties in the suit, the fact remains that as per Exhibit B-1, the first defendant got himself registered as a cultivating tenant under the Act. This factum has been clearly referred to in paragraph 7 of the written statement of the first defendant, which runs as follows:-

> "This defendant has been accepted as the cultivating tenant of the suit property by the Record Officer (Tahsildar) Tirunelveli. Under the provisions of the Tamil Nadu Agricultural Lands (Record of Tenancy Rights) Act, 1969 this defendant's name has been entered in the register, maintained for that purpose. The entry in the register of tenancy rights cannot be questioned or assailed in a Court of law. Under section 15 of the said Act, the entry should be presumed to be true and correct until the finding is altered or set aside by the forums specified therein."

Significantly, neither the plaintiff nor the second plaintiff chose to put forth any further pleading, such as a reply statement, attacking the order on any tenable ground to be countenanced by civil courts, such as fraud, collusion, etc. and seeking to set aside the said order on any such basis. Hence, we have to proceed on the basis that the plaintiff has not put forth any plea attacking this order, as standing vitiated on any tenable ground, such as fraud, collusion etc., so as to come within the purview of the civil court's jurisdiction.

3. Where an authority is constituted under an Act of legislature, conferring on him jurisdiction, for the purpose of determining questions arising under it and if that authority has exercised the jurisdiction vested in him and has rendered his determination, and furthermore as against the said determination, the machinery for further agitation has also been delineated in the Act itself, then the general remedy of suit before a civil Court will be barred. This is more so when the provisions of the Act say that the determination of the ultimate authority under it is final. There are exceptions to the above rule, such as where orders have been obtained by fraud, collusion,

etc., As stated above, we are not facing any such plea put forth by the plaintiffs.

4. We must countenance that on the question of a person getting registered as a cultivating tenant, the jurisdiction of the authority under the Act is ample enough to determine the controversy relating to the factum of demise, the subject-matter of demise, the existence of relationship of landlord and tenant and the propriety, factual and legal, of the demise and such other jurisdictional issues. While considering the question of exclusion of jurisdiction of the civil Court by virtue of section 16-A of the Act, a Full Bench of this Court, in *Perathambi Goundan v. The District Revenue Officer, Coimbatore*, (1980) 93 L.W.169. I.L.R. (1980)2 Mad.255= (1980)2 M.L.J.89= A.I.R. 1980 Mad.180 set out the ratio in the following terms:

> " .. .. For instnace, the statutory requirement for the preparation of a record under the Act is that the land must have been let for cultivation by a tenant. A controversy may arise whether the land has been let for cultivation by a tenant at all. The question to be considered is, whether the determination of that controversy is within the exclusive jurisdiction of the authorities functioning under the Act so as to bar the jurisdiction of the Civil Court under section 16-A. From the language of section 3(2) it cannot be stated that the determination of that controversy is within the exclusive jurisdiction of the authorities functioning under the Act, though the determination of that controversy is basic and fundamental to the exercise of the jurisdiction by the Record Officer and the other authorities under the Act. The very object of the Act is to provide for the preparation and maintenence of record of tenancy rights in respect of agricultural lands and therefore if there is no tenancy in respect of a land, there is no question of any further particulars being determined. This aspect is made clear even from the definition of the expression 'landowner' occurring in section 2(5) of the Act, because according to the said definition, 'landowner' means the owner of the land let for cultivation by a tenant and includes the heirs, assignee or legal representatives of such owner or persons deriving rights through him. Consequently, the controversy as to whether a particular piece of land has been let for cultivation by a tenant or not is one constituting the jurisdicitional issue which a Record Officer has to decide before he can determine any other matter under the Act. But that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act, because to hold so will enable the statutory authorities to assume jurisdiction by erroneously deciding the jurisdictional issue. If the controversy arises, the authorities functioning under the Act have necessarily to decide the same, because a decision on that controversy alone will determine the jurisdiction of the authorities functioning under the Act. If the decision is that the land has been let for cultivation by a tenant, then the Record Officer will have jurisdiction to determine the further particulars provided for in section 3(2) of the Act. If, on the other hand, the decision of the controversy is that the land has not been let for cultivation by a tenant, there is no question of there being any tenancy rights in respect of the said land and consequently, there is no question of the Record Officer ascertaining or determining any furtner particulars in this behalf. Therefore, if such controversy arisen, that controversy cannot be said to be within the exclusive jurisdiction of the authorities functioning under the Act, and any determination of that controversy by the authorities can be said to be only incidental to the assumption of jurisdiction by the authorities under the Act. Subject to this qualification, it can be held that once the Record Officer or any other authority functioning under the Act has came to the conclusion that the land has been let for cultivation by a tenant, the matters provided for in section 3(2) have to be determined by the Record Officer, or other authority functioning under the Act, and to that

extent the jurisdiction of the civil Court is barred under section 16-A of the Act."

If a controversy arises on any of the aspects, referred to by me above, the authority functioning under the Act has also jurisdiction to decide the same, because a decision over that controversy alone will determine the jurisdiction of the authority functioning under the Act to proceed further to determine any other matter under the Act. The fact that the controversy over the above aspects was not raised, put in issue and decided by the authority under the Act is of no legal consequence to whittle down the binding nature of the ultimate order. In such a case also the ultimate decision with regard to cognizance of tenancy rights by the authority under the Act will govern. Hence, we cannot subscribe our support to the view now advanced by Mr.T.Vadivelu, learned Counsel appearing for the second plaintiff, that the Civil Court, inspite of the decision rendered by the authority under the Act, could reopen the matter and give a different decision on this question. It would be a different matter if the matter had gone to the civil Court and a decision had been rendered by the Civil Court on these questions anterior to the decision of the authority under the Act and the Civil Court thereby holding that the lease in favour of the first defendant by the second defendant could not be legally sustained and has got to be ignored in the eye of law. The Civil Court can certainly go into these jurisdictional issues, which are not within the exclusive jurisdiction of the authority under the Act. But, such is not the case here. When the authority constituted under the Act has decided the ultimate question under the Act within his jurisdiction and competency and which he is enjoined to decide in the proceedings under the Act, it is not open to the Civil Court in a subsequent suit to sit in judgment over the same, as if it is an appellate authority and render a different decision. As we stated above, we are not called upon to test a plea properly put forth in the lis that the order passed by the authority stands vitiated on any ground like fraud, collusion, etc. We do not find any plea and furthermore, there is no proof. In the said circumstances, the order Ex.B-1 passed by the authority under the Act will have to govern until and unless it is set aside by any process known to law, including the process, if any, available under the Act and that will provide an answer for the first defendant to the action for possession prosecuted by the second plaintiff. Sustaining this ground put forth by the learned Counsel for the first defendant, the appellant herein, we are obliged to interfere in appeal.

5. We must also record that Mr.G.Subramaniam, learned Counsel for the first defendant, advanced the argument that any alienation, including a lease, during the currency of any order of injunction, will not make the lease itself a void one. Equally so, Mr.T.Vadivelu learned Counsel for the second plaintiff, advanced a submission that the muthavalli fulfilled only the character of a manager, the property vesting in the Almighty, and a lessee under him cannot acquire the rights of a cultivating tenant. We have no occasion to go into these aspects, because we have sustained the primary ground of attack put forth by the learned counsel for the first defendant, appellant herein. Accordingly, this appeal is allowed; the judgment and decree of the Court below are set aside; and the suit will stand dismissed. However, we make no order as to costs, both in the suit and in this appeal.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.4283 of 1982. 17th June, 1985.

G.N. Rajaram *Petitioner**

v.

Mukunthu N.Venkatarama Iyer *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (XXIII of 1973), section 10(3)(c) - Scope and applicability - Landlord occupying the entire first floor for residential purposes - A room in the ground floor of the premises in the occupation of tenant for non-residential purposes - Requirement of the landlord by way of additional accommodation for residential purpose of the portion in the occupation of the tenant - Building in question a residential building - Eviction order passed by the authorities confirmed in revision.

A room in the ground floor of a residential building in the occupation of the tenant was let out to him for non-residential purposes. The question was whether the landlord can secure an order under section 10(3)(c) of Act 18 of 1960 for eviction with reference to such a premises on the ground that it was required for residential purposes by way of additional accommodation.

Held:- Under section 10(3)(c) of the Tamil Nadu Buildings (Lease and Rent Control) Act though the words "building under tenancy" have not been used, yet it is provided that the order of eviction should direct the tenant to put the landlord in possession of the whole or any portion of the remaining part of the building. In section 10(3)(c) of the Act, the word 'building' has been used for the first time. In I.L.R. (1981)1 Madras 128 it is pointed out that a part of the building under the occupation of the landlord would not fall under the definition of 'building' under the Act, and therefore it has to be ascertained whether that part of the building in the occupation of the landlord is residential or non-residential. The word 'building' occurring in the expression 'any portion of the remaining part of the building in section 10(3)(c) of the Act may have reference to the accommodation under tenancy.

In this case there is no dispute that the entire first floor as well as part of the ground-floor is under the occupation of the landlord. Taking into account the accommodation available with the tenant and the other accommodation with the landlord together they will constitute the entirety of the house, which, undoubtedly, is one unit of accommodation, for, there is no dispute that apart from the petitioner, there are no other tenants in the ground-floor. Even excluding the first-floor and taking into account the ground-floor as a unit of accommodation, the accommodation in the occupation of the landlord and the tenant would together amount to one unit, namely the ground-floor as a whole. Therefore the objection that the order of eviction as passed by the authorities below could not have been so passed according to section 10(3)(c) is without substance. *[Para.7]*

Cases referred to:-

Md.Shafi v. Additional District and Sessions Judge, Allahabad, (1977)1 S.C.J. 566: (1977)2 S.C.C.226: (1977)2 S.C.R.464: A.I.R.1977 S.C.836, *M/s. M.Thirupathi Nadar and Sons v. Dr.S.L.Kantha Rao,* I.L.R. (1981)1 Mad.128.

T.V.Balakrishnan, for Petitioner.

Manicka K.Ramalingam, for Respondent.

The Court made the following

ORDER:- The tenant has preferred this Civil Revision Petition against the orders of the authorities below directing his eviction from the premises in his occupation, on an application taken out by the respondent herein under section 10(3)(c) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960, as amended by Act 23 of 1973 (hereinafter referred to as 'the Act'). The petitioner

is in occupation of a room in the ground-floor measuring about 10 feet by 8 feet in door No.52, Krishnapuram 2nd street, Madurai City, belonging to the respondent herein. There is no dispute that the respondent is living with seven members of his family in the first floor portion of this building. According to the respondent, the two rooms and a kitchen available in the first-floor are inconvenient and insufficient to accommodate the members of his family and that water facilities are not available in the first floor. Besides, the respondent also stated that his widowed sister-in-law, who has been staying with him, has heart trouble and could not get up the staircase to reach the first-floor. With a view to secure the ground-floor for residential purposes as and by way of additional accommodation, the respondent intimated two other tenants who were in occupation of portions in the ground-floor and they had vacated. Subsequently, the respondent issued a notice on 22.11.1977 to the petitioner, but the petitioner sent a reply stating that the respondent was only desirous of securing increased rent and that the need was not *bona fide*. Alleging that the premises in the occupation of the petitioner was *bona fide* required by the respondent by way of additional accommodation for residential purposes and that no prejudice would be caused to the petitioner as he owned two other buildings, the respondent filed R.C.O.P. No.37 of 1978 before the Rent Controller (District Munsif) Madurai Town, praying for an order of eviction against the petitioner.

2. In the statement of objections filed by the petitioner, besides stating that the requirement of the respondent was not *bona fide*, the petitioner pleaded that the premises had been leased out for a non-residential purpose and, therefore, the respondent cannot seek an order for eviction on the ground of his requirement by way of additional accommodation for residential purposes. It was also the further plea of the petitioner that the members of the family of the respondent were all conveniently residing in the first-floor portion and that accommodation would be sufficient and that the portion in the occupation of the petitioner is not required by the respondent. The heart ailment from which the sister-in-law of the respondent was stated to be suffering was denied by the petitioner. Referring to the availability of toilet and water facilities in both the floors, the petitioner stated that three rooms besides the non-residential portion were used by the respondent and there was no necessary to change it. The petitioner urged that he will be subjected to great hardship in the event of an order for eviction being passed and denied that the building owned by him can be put to non-residential user. Reiterating that the portion in the occupation of the respondent was convenient and would suffice and characterising the requirement of the respondent as lacking in *bona fides*, the petitioner prayed for the dismissal of the application for eviction.

3. Before the Rent Controller, on behalf of the respondent, Exhibits A-1 to A-7 were marked and the respondent was examined as P.W.1, while, on behalf of the petitioner, he examined himself as R.W.1. A Commissioner was deputed to make an inspection of the premises and he submitted a report and a plan and they were marked as Exhibits C-1 and C-2. On a consideration of the oral as well as the documentary evidence, the learned Rent Controller found that the requirement of the premises in the occupation of the petitioner by the respondent as and by way of additional accommodation is *bona fide*, as the sister-in-law of the respondent, who had been living with him, was suffering from congestive failure disabling her from climbing the upstairs. Rejecting the plea of the petitioner that a building occupied for non-residential purposes cannot be asked for as and by way of additional accommodation for residential purposes, the learned Rent Controller found that such a requirement could be countenanced under section 10(3)(c) of the Act and that the consideration of relative hardship would not require the dismissal of the application for eviction as the hardship caused to the respondent by refusing to grant an order for eviction will be more than that caused to the petitioner by granting it. On these conclusions, an order for eviction

was passed against the petitioner. Aggrieved by this, the petitioner preferred an appeal in C.M.A.No.47 of 1980 before the appellate authority (Additional Subordinate Judge), Madurai. On a consideration of the evidence, the appellate authority concurred with the conclusions of the learned Rent Controller and found that the requirement of the respondent for additional accommodation was *bona fide* and that there was no legal impediment in granting an order of eviction in his favour. In that view, the appeal was dismissed. It is the correctness of this order that is challenged in this Civil Revision Petition.

4. The principal contention of the learned Counsel for the petitioner is that the premises in the occupation of the petitioner had been let out for non-residential purposes and, therefore, the respondent cannot secure an order for eviction with reference to such a premises under section 10(3)(c) of the Act on the ground that it is required for residential purposes by way of additional accommodation. In addition, the learned counsel submitted that the concept of a unit of accommodation made up of the portion in the occupation of the landlord and the tenant should be applied, and if so done, no order for eviction can be passed against the petitioner. Reliance in this connection was placed by the learned Counsel upon the decision of the Supreme Court in *Md.Shafi v. Additional District and Sessions Judge, Allahabad,* (1977)1 S.C.J.566= (1977)2 S.C.C.226= (1977)2 S.C.R.464= A.I.R.1977 S.C.836. On the other hand, the learned counsel for the respondent submitted, relying upon the features disclosed by the report of the Commissioner, that the application under section 10(3)(c) of the Act and the granting of relief thereunder were quite in order and in accordance with the decision of the Division Bench of this Court in *M/s.M.Thirupathi Nadar and Sons v. Dr.S.L.Kantha Rao,* I.L.R. (1981) Madras 128 and, therefore no exception could be taken to the eviction order passed against the petitioner. It was also the further submission of the learned counsel for the respondent that though the idea of a unit of accommodation is alien under the provisions of the Act, which contains a definition of the word 'building', yet, even adopting that, either considering the entire premises or even the ground-floor alone as a unit, the claim of the respondent for additional accommodation of the premises in the occupation of the petitioner for residential purposes is fully justified.

5. Thus, the main question which arises for consideration is, whether the order of eviction passed against the petitioner under Section 10(3)(c) of the Act could not have been so passed on the ground that the tenancy of the premises in favour of the petitioner is for non-residential purposes, while the requirement of the respondent by way of additional accommodation is for residential purposes. Though earlier there have been some decisions of this Court having a bearing upon that question, all those decisions came to be considered in the context of the maintainability of an application for eviction with reference to sections 10(3)(a)(iii) and 10(3)(c) of the Act in *M/s. M.Thirupathi Nadar and Sons v. Dr.S.L.Kantha Rao,* I.L.R. (1981)1 Madras 128. In that decision, the landlord was residing in the first-floor of a building, while the tenant was in occupation of the ground-floor carrying on business. The application for eviction was filed both under sections 10(3)(a)(iii) and 10(3)(c) of the Act as the landlord required the ground-floor portion for the purpose of running a dispensary. The authorities below ordered eviction. In the Civil Revision Petition before this Court, the objection raised by the tenant was that Section 10(3)(c) of the Act alone would be applicable, in which case consideration of relative hardship would also be relevant and since there was neither plea nor evidence in support thereof, the application for eviction should be dismissed. In the context of considering this objection, the scope and requirements of Section 19(3)(c) of the Act was elaborately considered. It was pointed out that in the earlier decisions attention had not been paid to the qualifying words, "residential and non-residential" occurring in the beginning of section 10(3)(c) of the Act and that even if the word 'building' occurring in section 10(3)(c) of the Act is to be under-

stood differently from its definition contained in section 2(2) of the Act, there is no test for ascertaining whether a building is a residential one or a non-residential one and that before section 10(3)(c) of the Act is invoked, it is imperative to make it clear whether a building is a residential one or a non-residential one, as the purpose for which additional accommodation is required is inextricably bound up with the nature of the building. Emphasising the aforesaid aspects, it was laid down that section 10(3)(c) of the Act has to be read distributively, one dealing with residential building and the other with non-residential building. The Division Bench further proceeded to state that if so read, it will read as under with regard to residential building:-

> "A landlord who is occupying only a part of a residential building, may, notwithstanding anything contained in clause (a), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes."

and as follows in so far as non-residential buildings are concerned:

> "A landlord who is occupying only a part of a non-residential building, may, notwithstanding anything contained in clause (a), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for purposes of a business which he is carrying on."

Further, the scope of section 10(3)(c) of the Act has been stated to be as follows:-

> "Whatever meaning we attribute to the word "Building" occurring in section 10(3)(c), before section 10(3)(c) can be invoked, the first thing that has to be ascertained is whether the building is a residential building or a non-residential building. If it is a residential building, the landlord can obtain additional accommodation only for the purpose of his residence. If it is a non-residential building, the landlord can obtain additional accommodation only for the purpose of the business which he is carrying on. This conclusion flows from the use of the two expressions occurring in the section. One is the expression "additional accommodation" and the other is the expression "as the case may be". The word "additional" is in common use and its meaning is very well understood by people generally as being something that is added to or put into a thing already in existence .... Having regard to the dichotomy between the residential building and the non-residential building expressly provided for in the sub-section itself, eviction can be sought only for the purpose of residence if the building is a residential building and only for the purpose of carrying on a business if the building is a non-residential one."

Later, the Bench pointed out that for invoking section 10(3)(c) of the Act, the following conditions must be satisfied:-

> "In the case of a residential building additional accommodation can be obtained only for residential purpose. In the case of a non-residential building additional accommodation can be obtained only for purposes of business which the landlord is carrying on."

Finally, it was pointed out that section 10(3)(c) of the Act did not have any application in that case because the landlord did not require additional accommodation for purposes of residence, but wanted it for running his dispensary. It is significant that even according to the decision of the Division Bench, the user to which the premises is put by the tenant is not a determining or decisive factor in the consideration of a request for additional accommodation under section 10(3)(c) of the Act, but it is the occupation of a part of a residential or non-residential building by the landlord that would be relevant.

6. It is in the light of the aforesaid

principles laid down by the Division Bench that the propriety of the order of eviction passed in this case has to be viewed. There is no dispute that the entire first-floor is under the occupation of the respondent for residential purposes. The requirement by the respondent of the premises in the occupation of the petitioner as and by way of additional accommodation is also for residential purposes. Exhibit C-1, the report of the Commissioner, shows that even in the ground-floor, immediately west of the premises in the occupation of the petitioner, the portion delineated EF CH in the plan is used for purposes of residence. In paragraph 5 of Exhibit C-1, the Commissioner has stated that a Godrej and wooden bureau, a sofa-cum-bed and a sewing machine were all found and an old woman was also found sitting inside the room. The other features revealed by the report of the Commissioner clearly make out that the building in question is a residential building. With reference to such a building, the respondent is in occupation of the entire first-floor and also the other areas in the ground floor. Applying the considerations laid down in the decision of the Division Bench referred to earlier, it is at once obvious that the building being a residential one, which in part is also in the occupation of the respondent for residential purposes, there cannot be any objection whatever to the passing of an order for eviction against the petitioner under section 10(3)(c) of the Act.

7. That leaves for consideration the argument based upon the concept of a unit of accommodation referred to in the decision of the Supreme Court in *Md.Shafi v. Additional District and Sessions Judge, Allahabad*, (1977)1 S.C.J.566= A.I.R.1977 S.C.836. In that case, the Supreme Court considered Explanation (IV) to section 21(1) of the U.P.Urban Building (Regulation of Letting, Rent and Eviction) Act, 13 of 1972. Under section 3(i) of that Act, the word 'building' had been defined in a manner which is very different from the definition contained in section 2(2) of the Act. Further, under that Act, there is no provision similar to section 10(3)(c) of the Act. The Explanation which came up for interpretation before the Supreme Court related to one instance of conclusive proof that the building is required *bona fide* by the landlord and that was in a case where the building under tenancy was a part of a building, the remaining part whereof was in the occupation of the landlord for residential purposes. Under section 10(3)(c) of the Act, though the words, "building under tenancy" have not been used, yet, it is provided that the order for eviction should direct the tenant to put the landlord in possession of the whole or any portion of the remaining part of the building. In section 10(3)(c) of the Act, the word, 'building' has been used twice and it was with reference to the use of this word 'building' in section 10(3)(c) of the Act, for the first time the Division Bench pointed out that the definition under Section 2(2) of the Act would not be applicable, for, a part of the building under the occupation of the landlord would not fall under the definition of "building" under the Act and, therefore, it has to be ascertained whether that part of the building in the occupation of the landlord is residential or non-residential. The word 'building' occurring in the expression, "any portion of the remaining part of the building" in section 10(3)(c) of the Act may have reference to the accommodation under tenancy. However, section 10(3)(c) of the Act does not indicate a rule of conclusive presumption as was the case under Explanation (IV) to section 21(1) of the U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 13 of 1972. Even on the assumption that the considerations laid down in the decision of the Supreme Court would apply to section 10(3)(c) of the Act, that also appears to be satisfied in this case, for, it is pointed out by the Supreme Court that the question which should be asked is whether the accommodation under the tenancy and the accommodation in the occupation of the landlord together constitute one unit of accommodation. In this case, as pointed out earlier, there is no dispute that the entire first-floor as well as part of the ground-floor is under the occupation of the landlord. Indeed, the petitioner, in the course of cross-examination as R.W.1, candidly admitted

that the portion marked EF GH in the Commissioner's plan in the ground-floor had been occupied by the sister-in-law of the respondent, who had lost her husband and had been staying with the respondent for 15 years. Taking into account the accommodation available with the tenant and the other accommodation with the landlord together they will constitute the entirety of the house, which, undoubtedly, is one unit of accommodation, for, there is no dispute that apart from the petitioner, there are no other tenants in the ground-floor. Even excluding the first-floor and taking into account only the ground-floor as a unit of accommodation, the accommodation in the occupation of the landlord and the tenant would together amount to one unit, namely, the ground-floor as a whole. Therefore, even on the assumption that the considerations which were applied by the Supreme Court in the case arising under the provisions of the U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 13 of 1972, are applicable here, that is satisfied. Therefore, the objection of the petitioner that the order for eviction as passed by the authorities below could not have been so passed according to section 10(3)(c) of the Act is without substance.

8. There is overwhelming evidence to show that the sister-in-law of the respondent is a heart patient suffering from congestive failure and that it is difficult for her to move upstairs, which necessitates her staying downstairs. Having regard to the size of the family of the respondent, the existing accommodation available in the first-floor of the premises appears to be inadequate and insufficient. There is, therefore, no doubt that the authorities below were right in concluding that the requirement of the respondent was *bona fide*. No argument was addressed before this Court touching upon the question of relative hardship. In any event, it has been found by the authorities below that the petitioner owns buildings of his own and that it would not be difficult for him to find alternative accommodation. It is not the case of the petitioner that it is impossible to secure accommodation similar to the one now under his occupation. The authorities below, therefore, rightly concluded that the hardship on the petitioner will not outweigh the advantages to the landlord by granting an order of eviction in his favour. There is thus absolutely no illegality or irregularity in the order passed by the authorities below meriting interference in the exercise of the revisional jurisdiction under section 25 of the Act. Consequently, the order of eviction passed against the petitioner by the authorities below is upheld and the Civil Revision Petition is dismissed with costs.

9. The learned Counsel for the petitioner prays that the petitioner may be granted sometime to vacate and hand over vacant possession of the premises in his occupation to the respondent and the learned counsel for the respondent has no objection to grant three months' time to the petitioner for doing so. Accordingly, the petitioner is granted three months time from this day to vacate and hand over vacant possession of the premises in his occupation to the respondent, but this will be subject to the condition that the petitioner should file an unconditional affidavit of undertaking to that effect before this Court within a week from this day, failing which the order of eviction can be put into execution forthwith.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan and S.Nainar Sundaram, JJ.*

*Appeal No.935 of 1978. 18*th April*,1985.

Appavoo Nadar *Appellant**

v.

Chellian Nadar and others *Respondents.*

(A) Contract Act (9 of 1872), section 70 - Conditions for invoking - Suit for specific performance of an oral agreement of sale - Oral agreement found to be not true - Payment of Rs.50,000/- towards sale consideration found true - Specific performance negatived - Refund of money paid ordered.

(B) Unjust enrichment, doctrine of - Explained.

The conditions to be satisfied for invoking the aid of section 70 of the Indian Contract Act are three-fold:-

First, a person must lawfully do anything for another person or deliver anything to him. Second, the person so doing must have done it with no intention to do so gratuitously. Thirdly, the other person must have enjoyed the benefit thereof. If these conditions stand fulfilled then the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered. *[Para.11]*

In the instant case apparently, the three ingredients stand satisfied. The plaintiff had delivered a draft for Rs.50,000/- to the first defendant. It was clear that the plaintiff certainly had not done it with a gratuitous intention. The plaintiff would say that the payment was in pursuance of an agreement of sale. But it is found that the agreement of sale as such stood unsubstantiated. Yet, the fact remains that the payment of Rs.50,000/- was not certainly a gratuitous payment. Thirdly, the defendant did enjoy the benefit of this payment of Rs.50,000/-. *[Para.16]*

The basis for the liability to pay back or to compensate under section 70 is not either a subsisting or an ineffective or an unenforceable contract, but the absence of a contract and *de hors* it on voluntary acceptance and enjoyment of the thing done. *[Para.20]*

The principle under section 70 of the Act has no foundation in contract. It adumbrates the equitable principles inhibiting unjust enrichment and enabling the Court to order restitution. The principles may come into play even when there was a contract which proved abortive and ineffective. Even then relief could be asked for and granted not on the ground that there was a contract, but on the principle that no man should unjustly enrich himself without compensating for the same to the other, who gave the benefit and disgorging what he received, when what he received was not paid or delivered gratuitously. In order to maintain the action, it is not essential that the money sought to be relevant should have been received by the defendant under such circumstances so as to create a privity between him and the plaintiff. The Court imposes an obligation to repay, on the defendant, on the ground that it is just and reasonable to do so. This obligation is independant of any consent or intention of the parties or any privity of contract, and this obligation has got the foundation only in equity. It is only the equitable principle which has found expression in section 70 of the Act. *[Para.22]*

Section 70 would cover the case of payment of money. The set of expressions "delivers anything to him" is of wide amplitude and would certainly cover a case of delivery of money. *[Para.28]*

In view of the legal position, there is no difficulty in according the relief of repayment of the money paid by the plaintiff when there is no factual impediment in the way.

Cases referred to:-

Mulamchand v. M.P.State, (1968)3 S.C.R. 214: A.I.R.1968 S.C.1218: *Madasami Nadar*

v. Virudunagar Municipality, (1977)1 M.L.J.257: I.L.R. (1977)1 Mad.261: 90 L.W.72: A.I.R.1977 Mad.147; *Union of India v. Sita Ram*, (1976)4 S.C.C.505: (1977)1 S.C.R.979: A.I.R.1977 S.C.329; *Fibrosa v. Fairbairn*, (1943) A.C.32; *Nelson v. Larholt*, (1948)1 K.B.330; *Hansraj Gupta and Company v. Union of India*, (1973)2 S.C.C.637: A.I.R.1973 S.C.2724: (1973)2 S.C.R.509; *State of West Bengal v. B.K.Mondal and Sons*, A.I.R.1962 S.C.779; *Union of India v. Lal Chand and Sons*, A.I.R.1967 Cal.310; *Dominion of India v. Preety Kumar*, A.I.R. 1958 Pat.203; *Nityananda Mudaliar v. Arunachalam Chettiar*, I.L.R. (1958)1 Mad.223: (1958)71 L.W.50 (2); *Nellie Wapshare v. Fierce Leslte and Company*, (1960)2 M.L.J.401: I.L.R. (1960) Mad.407: A.I.R.1960 Mad.410; *Thomas Abraham v. National Tyre and Rubber Company*, (1973)3 S.C.C.458: A.I.R.1974 S.C.602; *Perumal v. Kamakshi*, (1938)2 M.L.J.189: I.L.R. (1938) Mad.933: 48. L.W.220: A.I.R.1938 Mad.785; *Sheo Nath Prasad v. Sarjoo Nonia*, A.I.R.1943 All. 220; *Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar*, (1909) I.L.R.33 Mad.15: 19 M.L.J.489; *Chengalroya Reddi v. Udai Kovour*, A.I.R.1936 Mad.752: (1936)44 L.W.214; *Khader Khan Sahib v. Doraiswami Chettiar*, (1974)2 M.L.J. 270: 87 L.W.517: A.I.R.1974 Mad.371; *Union of India v. Sita Ram*, (1976)4 S.C.C.505: A.I.R.1977 S.C.329; *Devi Sahai v. Union of India*, (1976)4 S.C.C. 763: A.I.R.1977 S.C.2082; *Raja Mohan v. Manzoor Ahmad*, (1943)1 M.L.J.508: (1943) 70 I.A.1: A.I.R.1943 P.C.29; *Kedar Lal v. Hari Lal*, (1952) S.C.J.37: (1952) S.C.R.179: (1952)1 M.L.J.431: A.I.R.1952 S.C.47: 65 L.W.179; *Ram Nagina Singh v. Governor General - In Council*, A.I.R.1952 Cal.306; *Nagubai v. B.Shama Rao*, 1956 S.C.J.655: 1956 S.C.R.451: A.I.R.1956 S.C.593; *Bhagwati v. Chandramauli*, (1967)1 S.C.J.666: (1966)2 S.C.R.286: A.I.R.1966 S.C.735; *Pilo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona*, (1971)1 S.C.J.119: (1971) M.P.L.J.695: A.I.R.1970 S.C.1201: (1970)3 S.C.R.415; *R.G.Vakil v. Ramendra Nath Banerjee*, (1984)88 Cal.W.N.905.

S.Chellaswami, for Appellant.

T.R.Rajagopalan, for Respondents.

The Judgment of the Court was delivered by

Nainar Sundaram, J.:- The plaintiff in O.S.No.15 of 1977 on the file of the Subordinate Judge of Kuzhithurai, is the appellant in this appeal. The respondents are the defendants in the suit. The suit was laid for specific performance of an agreement of sale or, in the alternative, for recovery of the sum of Rs.80,000/-. The allegations on the basis of which the plaintiff wanted the reliefs may be set out as follows On 18.5.1976, the first defendant orally agreed to sell the suit property to the plaintiff for a consideration of Rs.80,000/-. In pursuance of the said agreement, the plaintiff paid a sum of Rs.30,000/- in cash on 18.6.1976. He also paid another sum of Rs.50,000/- on 21.6.1976 by a draft as per Pay Order No.1028 of the Union Bank of India, Marthandam. The said draft was encashed by the first defendant on 23.6.1976. As the plaintiff's daughter was proposed for marriage to the first defendant's son, the plaintiff did not get the sale deed executed immediately. After the marriage, the plaintiff was pressing the first defendant to execute the sale deed on various occasions. Ultimately on 2.10.1976, the plaintiff pressed the first defendant to return the amount or to execute the sale deed and there was a wordy altercation between the plaintiff and the first defendant, but the first defendant did not yield to the request of the plaintiff but ill-treated his daughter and sent her away. Das, Dasayyan, Kamalam, Elias, Sivagnanam, John James and Velappan were present at the time of the oral agreement for sale. In spite of notices dated 23.10.1976 and 23.11.1976, the first defendant has not executed the sale deed. On 2.11.1976, the first defendant sent a reply through his counsel raising false allegations. The plaintiff is entitled to get a sale deed executed and registered in his favour by the defendants and to get a decree for specific performance of the agreement of sale entered into on 18.5.1976 and for recovery of the suit property from the defendants. If, however, the Court is of the opinion that the

plaintiff is not entitled to specific performance of the agreement of sale of the suit property, the defendants may be directed to pay the plaintiff the sum of Rs.80,000/- with future interest at the rate of 6 per cent per annum. Defendants 2 to 4 are the children of the first defendant. Subsequent to the notice dated 23.10.1976 issued by the plaintiff to the first defendant, the first defendant alienated the suit property to defendants 2 to 4.

2. The written statement of the first defendant ran as follows: The allegation that the first defendant agreed to sell the suit property in favour of the plaintiff for Rs.80,000/- is false and the further allegation that the first defendant received an advance of Rs.30,000/- is also denied. In connection with the marriage of the first defendant's son, who is an advocate, with the plaintiff's daughter, it was agreed by the plaintiff that he shall pay Rs.50,000/- to the first defendant for the purpose of defraying the marriage expenses as well as for conveying a suitable property by the first defendant in favour of the plaintiff's daughter. Accordingly, the plaintiff gave the draft for Rs.50,000/- in favour of the first defendant on 23.6.1976, the date of the draft being 21.6.1976. As per that agreement, the first defendant executed a sale deed of a property consisting of nearly 1.75 acres of coconut garden and 1.50 acres of rubber plantation in favour of the plaintiff's daughter on 23.6.1976 itself. In the sale deed, the consideration was mentioned less to save registration expenses. It was the plaintiff who spent for the registration of the document. Because he had to meet the expenses, the plaintiff suggested that the consideration can be given at a low figure and the document be registered in Kulathoor Sub. Registrar's Office in Kerala. The allegation that the plaintiff was pressing the first defendant to return the amount or to execute the sale deed is without basis. There was no ill-treatment of the plaintiff's daughter, nor did the first defendant send her away. The draft for Rs.50,000/- was received and the amount was utilised in the manner referred to above. The other allegation with regard to the wordy altercatin between the plaintiff and the first defendant is also denied. No amount is due from the first defendant to the plaintiff. There was no demand on 2.10.1976 as alleged. The averment that the persons mentioned in the plaint were present at the time of the alleged oral agreement is false and is denied. The plaintiff is not entitled to any relief and the claim for specific performance is without basis. The description of the property is vague, erroneous and misleading. In the additional written statement, the first defendant attacked the alternative claim for the return of Rs.80,000/- by stating that so far as there was no agreement to sell the property, the question of return of Rs.80,000/- does not arise. The only amount received was Rs.50,000/- and the first defendant reiterated in his additional written statement the circumstances under which and the purposes for which the said amount was received as set out in his original written statement.

3. Defendants 2 to 4 also contested the suit. Besides adopting the written statement of the first defendant, these defendants wanted to maintain the alienation in the form of settlements in their favour effected by the first defendant.

4. The pleadings put forth by the parties led the Court below to formulate the following issues:

1. Whether the plaintiff paid Rs.30,000/- on 18.6.1976 as alleged?

2. Whether the oral agreement to sell claimed by the plaintiff is true?

3. Is the plaintiff entitled to specific performance?

4. To what relief?

Additional issue framed on 23.6.1977:

1. Is it true that the defendant sold his properties to the plaintiff's daughter for Rs.50,000/-?

Additional issued framed on 14.10.1977:

1. Whether the defendant has received Rs.80,000/- from the plaintiff?

2. Whether the alternative claim for the return of Rs.80,000/- with interest is tenable in case the court is of the opinion that the plaintiff is not entitled to specific performance of the contract for sale of the suit property?

3. Whether the plaint schedule property belonged to the defendant?

The parties placed their evidence, oral and documentary. The court below assessed the evidence and on issues No.1 and 2, Additional issue No.1 framed on 23.6.1977 and Additional issues Nos.1 and 2 framed on 14.10.1977, held that the claim of the plaintiff that he paid Rs.30,000/- on 18.6.1976 is not proved; that the oral agreement of sale claimed by the plaintiff is not true; that the claim of the first defendant that he sold his properties to the plaintiff's daughter out of the amount received, namely, Rs.50,000/- from the plaintiff is true; that the plaintiff failed to establish that the defendant received Rs.80,000/- for the alleged agreement of sale; and that the plaintiff is not entitled to the relief on the alternative claim for the return of Rs.80,000/- with interest. On additional issue No.3 framed on 14.10.1977, the Court below held that the suit property did belong to the first defendant. On issues Nos.3 and 4, the Court below held that the plaintiff is not entitled to the relief of specific performance and the plaintiff is also not entitled to any relief in the suit. As a result, the suit of the plaintiff was dismissed with costs. This appeal is directed against the judgment and decree of the Court below.

5. Mr. S.Chellaswami, learned Counsel appearing for the plaintiff, appellant herein, would first endeavour to demonstrate that there was in fact an agreement of sale on 18.5.1976; and pursuant to such an agreement of sale, a sum of Rs.30,000/- was paid in cash on 18.6.1976 and a further sum of Rs.50,000/- was paid by a draft on 21.6.1976 and hence, his client is *prima facie* entitled to the relief of specific performance of the agreement of sale. In the alternative, learned Counsel for the plaintiff would contend that even if this court should not accept the case of the plaintiff with regard to the agreement of sale, this Court must countenance the case of the plaintiff for the return of the sum of Rs.80,000/- to the plaintiff. As against these contentions put forth on behalf of the plaintiff, Mr. T.R.Rajagopalan, learned Counsel for the defendants, respondents herein, would submit that the materials placed in the case do not make out a case of an agreement of sale as alleged by the plaintiff and hence, the plaintiff could not get specific performance of the agreement of sale at all. With regard to the alternative prayer for the return of the sum of Rs.80,000/- learned Counsel for the defendants would contend that the payment of Rs.30,000/- in cash alleged by the plaintiff has not been substantiated at all and with regard to the payment of Rs.50,000/-, the case of the first defendant that it was so paid to defray the marriage expenses of the plaintiff's daughter to the first defendant's son and for giving a property in favour of the plaintiff's daughter deserves acceptance since such a case has been made out on evidence. Learned counsel for the defendants would also contend that the legal basis of the alternative prayer for the return of the money has not at all been set out in the plaint and in the absence of specific pleadings, this Court shall not proceed to countenance such an alternative prayer for the refund of the money. The submissions made by both the sides lead us to concentrate on three questions for which answers have got to be found one way or the other, both on assessment of facts as well as the law. The first question is as to whether there was an agreement of sale on 18.5.1976 as alleged by the plaintiff. If the first question is answered in favour of the plaintiff, accepting his case in toto, the other two questions may not arise for consideration. If, however, the first question is to be answered in the negative, then, the other two questions follow. The second question is, whether there was a payment of Rs.30,000/- in cash on 18.6.1976. There is no dispute about the payment of Rs.50,000/- by draft, though there is a controversy with regard to the purpose for which it was paid and this controversy requires advertence to and scrutiny while considering the third question. The third

question is as to whether the plaintiff is entitled to get a return of the sum of Rs.80,000/- or Rs.50,000/-, as the case may be.

6. Coming to the first question, the plaintiff covets specific performance of an agreement of sale stated to have been entered into by him with the first defendant on 18.5.1976. Was there such an agreement as pleaded by the plaintiff in the present case?

* * * Discussion of evidence omitted..

7. Hence, we have to eschew and discountenance the plea of the plaintiff for specific performance of the alleged oral agreement of sale stated to have been entered into on 18.5.1976.

8. Mr. S.Chellaswami, learned Counsel for the plaintiff, would plead that if this court should choose not to accept the case of the plaintiff that there was an oral agreement of sale on 18.5.1976, this Court should at least direct the first defendant to refund the sum of Rs.80,000/- parted with by the plaintiff to the first defendant. Learned counsel would like to support this prayer on principles of equity found countenance in statute law also. Before we advert to this question, we must be convinced that the plaintiff did part with the sum of Rs.80,000/- to the first defendant. Only when this is accepted, there may be need to examine the question as to whether the plaintiff can claim back the amount paid. We may straightaway point out that with regard to the payment of Rs.50,000/- by bank draft dated 21.6.1976, such payment is admitted by the first defendant, though the first defendant would contend that it was meant to serve different purposes and such purposes got factually served and hence, there is no warrant for claiming refund. But the factum of receipt of Rs.50,000/- by bank draft is the admitted position. Hence, we have to examine as to whether the payment of the other sum of Rs.30,000/- stated to have been made by the plaintiff to the first defendant in cash on 18.6.1976 is true.

* * * Discussion of evidence omitted.

9. The case of the plaintiff in this regard is totally unacceptable to us and no conviction has been brought to our mind on the evidence placed in the case that the plaintiff did part with this sum of Rs.30,000/- on 18.6.1976, as pleaded by him. Hence, we have to negative this case of the plaintiff.

10. With regard to the sum of Rs.50,000/-, we have already found that there was a payment, which stands established by evidence and which is also the admitted position. Of course, the first defendant would plead that the said sum of Rs.50,000/- was paid to serve specified purposes and it got adjusted and discharged. If this plea of the first defendant is eschewed, then the question that will arise for consideration is - can the plaintiff in the present suit claim the refund of atleast the sum of Rs.50,000/-? We must straightaway point out that we are not accepting the plea of the first defendant that this sum of Rs.50,000/- was paid to meet different exigencies and got discharged and we shall give our reasons therefor shortly. We are proceeding on the basis that this sum of Rs.50,000/- was parted with by the plaintiff to the first defendant and the first defendant did enjoy the benefit of this sum of Rs.50,000/-.

11. Mr. S.Chellaswami, learned Counsel for the plaintiff, would like to support the claim of the plaintiff for the refund of the moneys paid, under the equitable principles prohibiting unjust enrichment and countenancing restitution which principles are the inspiration behind section 70 of the Indian Contract Act, hereinafter referred to as the Act. Section 70 of the Act reads as follows:

> "Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The conditions to be satisfied for invoking the aid of section 70 of the Act are three-fold. First, a person must lawfully

do anything for another person or deliver anything to him. Second the person so doing must have done it with no intention to do so gratuitously. Third, the other person must have enjoyed the benefit thereof. If these three conditions stand fulfilled, then the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered. In *State of West Bengal v. B.K.Mondal and Sons*, A.I.R.1962 S.C.779, with regard to the conditions to be fulfilled, it was observed as follows.

"It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously, and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered." Page 786.

12. In *Mulamchand v. M.P.State*, (1968)3 S.C.R.214. A.I.R.1968 S.C.1218, the necessity to have the three conditions satisfied was adverted to in the following terms:

"...But if money is deposited and goods are supplied or if services are rendered in terms of the void contract, the provisions of section 70 of the Indian Contract Act may be applicable. In other words, if the conditions imposed by section 70 of the Indian Contract Act are satisfied then the provisions of that section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him, the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously, and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered." Pages 221-222.

13. In *Ramaboyan and another v. State of Tamil Nadu*, A.S.No.59 of 1970, judgment dated 31.10.1974 - concisely reported in (1974) TNLJ 495 a Bench of this Court, consisting of Ramaprasada Rao, J. as he then was, and Ratnavel Pandian, J. recapitulated the three limbs of section 70 of the Act in the following terms:

"... section 70 postulates three limbs. The first one is a person lawfully does anything for another or delivers anything to him. The second is that he does so or delivers so not intending to do so gratuitously. And the third is that the other person enjoys the benefit thereof. If all the limbs postulated in the section are cumulatively and concurrently satisfied, then the law imposes a quasi contract as between these two persons and compels the other person to make compensation to the first person in respect of such thing done or thing delivered by the former to the later." Pages 496-497.

14. In *Madasami Nadar v. Virudunagar Municipality*, (1977)1 M.L.J.257= I.L.R. (1977)1 Mad.261= 90 L.W.72= A.I.R.1977 Madras 147, the very same Bench reiterated the fulfilment of the three conditions before there could be an invocation of section 70 of the act.

15. In *Union of India v. Sita Ram*, (1976)4 S.C.C.505= (1977)1 S.C.R.979= A.I.R.1977 S.C.329, the three ingredients to support the cause of action under section 70 of the Act and their significance were adverted to in the following terms:

"The three ingredients to support the cause of action under section 70 of the Indian Contract Act are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second,

the thing done or the goods delivered is so done or delivered 'not intending to do so gratuitously.' Third, the person to whom the goods are delivered 'enjoys the benfit thereof.' It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered." Page 330

16. Apparently the three ingredients do stand satisfied in the present case. The plaintiff had delivered the draft for Rs.50,000/- to the first defendant. The plaintiff certainly had not done it with a gratuitous intention. Of course, the plaintiff would say that the payment was in pursuance of an agreement of sale. But we have found that the agreement as such stands unsubstantiated. Yet, the fact remains that the payment of Rs.50,000/- was not certainly a gratuitious payment. Thirdly, the defendant did enjoy the benefit of this payment of Rs.50,000/-. His case of payment towards different purposes and discharge of the sum of Rs.50,000/- is not being accepted by us for reasons to be expressed hereinafter. Hence we would be inclined to order refund of this sum of Rs.50,000/- to the plaintiff. But before we countenance this claim, we have to advert to and dispel certain contentions, which have been conceived of and expressed before us by the learned Counsel for the defendants as coming in the way of this Court granting this relief. One such contention that was advanced by Mr. T.R.Rajagopalan, learned Counsel for the defendants, is that the principles under section 70 of the Act could be invoked only when there was in fact a contract, the result of consensus between the parties, but the contract could not be enforced for one reason or another, or becomes invalid and according to the learned Counsel, then only the plaintiff could fall back upon section 70 of the Act to get the relief of restitution. We are not able to subscribe our support to this theory. In *Fibrosa v. Fairbairn*, (1943) A.C.32 Lord Wright stated the legal position as follow

..."any civilised system of law is boı to provide remedies for cases of w has been called unjust enrichment unjust benefit, that is, to prevent man from retaining the money of, some benefit derived from, anot which it is against conscience that should keep. Such remedies in Eng Law are generally different fı remedies in contract or in tort, are now recognised to fall within third category of the common law wł has been called quasi-contract or re tution."

In *Nelson v. Larholt*, (1948)1 K.B.330, I Denning observed as follows:

"It is no longer appropriate to c a distinction between law and eqı Principles have now to be stated the light of their combined effect. is it necessary to canvass the nice of the old forms of action. Reme now depend on the substance of right, not on whether they can be fı into a particular framework. The ı here is not peculiar to equity contract or tort, but falls natu within the important category of c where the court orders restitutioı the justice of the case so requires."

In *Mulamchand v. M.P.State*, (1968)3 S.(214= A.I.R.1968 S.C.1218, the observat of Lord Wright and of Lord Denr extracted above, were adverted to it was further observed as follows:

"... The important point to notice that in a case falling under sec 70 the person doing something another or delivering something another cannot sue for the spe performance of the contract, nor for damages for the breach of contract, for the simple reason there is no contract between him the other person for whom he something or to whom he del something. So where a claim compensation is made by one pe against another under section 70 is not on the basis of any subsi contract between the parties but

a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution." Page.222

17. In *Hansraj Gupta and Company v. Union of India*, (1973)2 S.C.W.R.509= (1973)2 S.C.C.637= A.I.R.1973 S.C.2724, it has been countenanced that the liability under section 70 of the Act arises on equitable grounds, even though express agreement or a contract may not be proved.

18. In *Madasami Nadar v. Virudhunagar Municipality*, (1977)1 M.L.J.257= A.I.R.1977 Madras 147, Ramaprasada Rao, J. as he then was, and Ratnavel Pandian, J. summed up the position under section 70 of the Act in the following terms:

> "From the foregoing discussion, it is clear that in order to rest a claim under section 70 of the Contract Act, there need not be a pre-existing legal obligation on the part of the claimant to supply or to serve. So long as it is not an officious over-bearance on the part of the plaintiff to intermeddle and cause the supply to be made or cause the work to be done, he can claim compensation provided he did make such supply or did the work not intending to do so or supply so, gratuitously. If it is fairly clear that the plaintiff *bona fide* acted with the genuine intention of supplying the goods or doing the work, then if it is not intended to be a free or gratuitous act, he is bound to be compensated by the other party for such an overt but sincere act done by the initiating party did not go waste since the party against whom compensation is claimed did have the benefit of the supply of the goods or the performance of the work. So long as the act is not illegal the jurisdiction of the court to grant relief is always available so as to avoid unjust enrichment and also on the basis of an implies forging of a quasi contract between the two parties." Page. 152.

19. In Chitty on Contracts, Twenty-fifth edition, in the chapter dealing with restitution, the passage under the heading, General Principles, in Paragraph 1964, runs as follows:

> "Where money has been paid under a transaction that is or becomes ineffective the payer may recover the money provided that the consideration for the payment has totally failed. Although the principle is not confined to contracts most of the cases are concerned with ineffective contracts."

20. We are clear in our mind that the basis for the liability to pay back or to compensate under section 70 of the Act is not either a subsisting or an ineffective and unenforceable contract, but the absence of a contract and *de hors* it on voluntary acceptance and enjoyment of the thing done. The Supreme Court, in *State of West Bengal v. B.K.Mondal and Sons*, A.I.R.1962 S.C.779, while expounding the implication of the word 'lawfully' in section 70 of the Act, observed as follows.

> "...It is of course true that between the person claiming compensation and the person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word 'lawfully' in section 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise to the claim for compensation." Page.788

The doing of a thing or delivering of a thing lawfully by one to another need not necessarily have the origin in a contract, which may prove abortive, but also in other contingencies outside the sphere of contract. The terms of the section are indisputably wide, to clothe the Courts with the power and discretion to meet out substantial justice in those cases where there would be difficulties to demonstrate

the existence of any relationship traceable to a contract. Our attention has not been drawn to any authority, which has countenanced a proposition that the operation of section 70 of the Act should be confined only to those cases where there was, in fact, a contract, but which could not be fulfilled or implemented for one reason or another. The principle is not to be confined to contracts which have proved ineffective, although as per the passage in Chitty on Contracts, extracted above, most of the cases may be concerned with ineffective contracts.

21. In *Union of India v. Lal Chand and Sons*, A.I.R.1967 Calcutta 310, Bijayesh Mukherji, J. after adverting to the pronouncement of the Supreme Court in *State of West Bengal v. B.K.Mondal and Sons*, A.I.R.1962 S.C.779, held that the basis for section 70 of the Act is not a subsisting contract but just the opposite, absence of the contract, and its basis is something done by one for another coupling with the work so done having been accepted by the other. In *Dominion of India v. Pretty Kumar*, A.I.R.1958 Patna 203, C.P.Sinha, J. observed at page 209 as follows:

> "... This section, in my opinion, is not founded on contract but embodies the equitable principle of restitution and prevention of unjust enrichment."

and Dayal, J. the other learned Judge, who constituted the Bench, expressed his concurrence for the above propostition.

22. In our considered view, the principle under section 70 of the Act has no foundation in contract. It adumbrates the equitable principles inhibiting unjust enrichment and enabling the Court to order restitution. The principles may come into play even when there was a contract which proved abortive and ineffective. Even then relief could be asked for and granted not on the ground that there was a contract, but on the principle that no man should unjustly enrich himself without compensating for the same to the other, who gave the benefit and disgorging what he received, when what he received was not paid or delivered gratuitously. In order to maintain the action, it is not essential that the money sought to be recovered should have been received by the defendant under such circumstances so as to create a privity between him and the plaintiff. The Court imposes an obligation to repay, on the defendant, on the ground that it is just and reasonable to do so. This obligation is independent of any consent or intention of parties or any privity of contract, and this obligation has got the foundation only in equity. It is only this equitable principle which has found expression in section 70 of the Act.

23. The doctrine of unjust enrichment was discussed by P.N.Ramaswami, J. in *Nityananda Mudaliar v. Arunachalam Chettiar*, (1958)71 L.W.50= I.L.R. (1958) Mad. 233. In the light of English pronouncements and other treatises on the subject as well as pronouncements of this country, the learned Judge summed up the position in paragraph 20 of the judgment as follows:

> "To sum up. *Bonus Judex secundum aequum et bonum Judicat aequitatem stricto Juri praefert* - (Coke on Littleton 24) - a good Judge decides according to Justice, and right and prefers equity to strict law. 'I commend the Judge' observed Lord Hobart, 'that seems fine and ingenious, so it tend to right and equity, and I condemn them that either out of pleasure to show a subtle wit will destroy, or out of incuriousness or negligence will not labour to support, the act of the party by the art or act of the law." Page 57

24. In *Nellie Wapshare v. Pierce Leslie and Company*, (1960)2 M.L.J.401= I.L.R. (1960) Mad.407= A.I.R.1960 Madras 410, P.N.Ramaswami, J. and Anantanarayanan, J. as he then was, adverted to the origin and development of the doctrine of unjust enrichment in the following terms:

> "The doctrine of unjust enrichment was originally based in English Law upon the principle of assumpsit or 'had and received.' It underwent certain changes through judicial interpretation, and came to be based more and more on the doctrine of restitution. In India the principle was developed under sections

69 and 70 of the Contract Act, and it is generally recognised that these sections (sections 69 and 70) are much wider in scope than the doctrine as applied in England, and go far beyond it."

25. In *Thomas Abraham v. National Tyre and Rubber Company*, (1973)3 S.C.C.458= A.I.R.1974 S.C.602, the Supreme Court observed as follows:

> "... It is an established principle of common law that an action for money had and received is a practical and useful instrument to prevent unjust enrichment. The law implies an obligation to repay the money which is an unjust benefit." Page.606

26. Chitty on Contract, Twenty-fifth Edition, in the chapter dealing with the subject 'restitution' in paragraph 1932, under the heading, Equity, observes as follows:

> "The common law has not been alone in providing a remedy for unjustifiable enrichment. Equity independently developed some principles which are aimed at the same result, viz., to force a man to disgorge property in his possession which rightly 'belongs' to the plaintiff.."

27. In view of the above discussion of the legal position, we do not find any difficulty in according the relief of repayment of the money paid by the plaintiff when there is no factual impediment in the way. Once we do not accept the case of the first defendant that the payment of Rs.50,000/- was meant to serve different purposes and got discharged by the said purposes, and we are expressing the reasons therefor hereinafter, then it has got to be held that the defendant did receive and enjoy the benefit of the payment made by the plaintiff. Merely because we have eschewed the case of the plaintiff that there was an oral agreement of sale on 18.5.1976 for want of substantiation of the same, we cannot shut our eyes to the factum of payment of Rs.50,000/-. Our inability to accept the plaintiff's case of oral agreement of sale will not provide a cover for the defendant with regard to his liability to refund this payment, in the absence of any convincing answer for the same both in law and on facts. As pointed out by the Supreme Court in *Hansraj Gupta and Company v. Union of India*, (1973)2 S.C.W.R.509= A.I.R.1973 S.C.2724, the remedy under section 70 of the Act could be accorded on equitable grounds, even though express agreement or a contract may not be proved. The words in the section 'such other person enjoys the benefit thereof' referable to the defendant in the suit, mean a conscious receipt of the benefit and utilising the same. It would be a different matter if the payment was voluntary and was intended to be gratuituous. As observed by the Supreme Court in *State of West Bengal v. B.K.Mondal and Sons*, A.I.R.1962 S.C.779, lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed, but because what has been done has been accepted and enjoyed by the latter. When the payment has been made by the plaintiff to the defendant without any gratuitous intention and the defendant receives it and enjoys it, though he would offer a discharge for the same, which is being found to be not tenable, the defendant must be deemed to have accepted and enjoyed that benefit and the principle inhibiting unjust enrichment would intervene and would enable the Court to direct restitution of that benefit to the plaintiff by the defendant. As we observed earlier, the principles do not present any difficulty for us for countenancing the case of the plaintiff for refund of the sum of Rs.50,000/-.

28. Mr. T.R.Rajagopalan, learned Counsel for the defendants, would contend that section 70 of the Act has no application to the case of payment of money, and in the present case, the plaintiff cannot be deemed to have delivered anything to the defendant and 'anything' could only mean *in specie* and not payment of money. In support of this submission, learned counsel relies on the following observation of Varadachariar, J. in a Full Bench decision of this Court in *Perumal v. Kamakshi*, (1938)2 M.L.J.189= I.L.R. (1938) Mad.

933= 48 L.W.220= A.I.R.1938 Madras 785:

> "... It only remains to add that section 70, Contract Act, which has sometimes been appealed to, is scarcely appropriate to a case of money lent to the defendant. There is no possibility in such a case or even a contemplation of the 'thing delivered' being restored - which obviously means *in specie*; and lending money to the defendant cannot be described as something done for the defendant." Page.794

Learned counsel also relies on a Full Bench decision of the High Court of Allahabad in *Sheo Nath Prasad v. Sarjoo Noma*, A.I.R.1943 Allahabad 220, wherein the observations of Varadachariar, J. extracted above, had found approval. First of all, we must point out that the case dealt with by the Full Bench of this Court related to an insufficiently stamped promissory note and the Full Bench was directly called upon to decide the question as to whether a person, who has lent money on a promissory note, can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower, but is inadmissible in evidence owing to a defect in the stamping, and we find that no question under section 70 of the Act directly came up for consideration before the Full Bench. In the case dealt with by the Full Bench of the Allahabad High Court, it was found that the promissory note was executed in proof of a debt and the promissory note was insufficiently stamped, and was therefore inadmissible in evidence and the plaintiff could not prove the loan by oral evidence. In that contingency, the Full Bench of the Allahabad High court declined to fall back upon section 70 of the Act. We are not prepared to cull out the observations in the above pronouncements out of the context of the cases dealt with therein to hold authoritatively that section 70 of the Act could never cover up a case of payment of money. The set of expressions 'delivers anything to him' is of wide amplitude and would certainly cover a case of delivery of money. *Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar*, (1909) I.L.R.33 Madras 15= 19 M.L.J.489 was a case where money was deposited to set aside a sale in execution of money decree against the defendant and the amount was paid to the decree--holder and the sale was set aside and the defendant got back the land sold, the decree debt due by the defendant having been extinguished by the plaintiff's payment. The application of section 70 of the Act was invoked and this Court did not discountenance it on the ground, it would not cover a case of payment of money, but the case of the plaintiff was rejected on the other ground that it was a case of voluntary payment to protect his own interest. In *Chengalroya Reddi v. Udai Kavour*, (1936)44 L.W.214= A.I.R.1936 Madras 752, a Bench of this Court invoked section 70 of the Act, where the plaintiff paid the money due to the Government for arrears of revenue on behalf of other villagers and saved their villages being sold. In *Khader Khan Sahib v. Doraiswami Chettiar*, (1974)2 M.L.J.270= 87 L.W.517= A.I.R.1974 Mad.371, another Bench of this Court countenanced the invocation of section 70 of the Act to a case where the plaintiff paid money which went in to discharge the mortgage decree, but for which payment the property would have been sold in court auction. In *Mulamchand v. M.P.State*, (1968)3 S.C.R.214= A.I.R.1968 S.C.1218, it has been countenanced that 'if money is deposited' (emphasis supplied by under-lining) and goods are supplied or if services are rendered in terms of the void contract, the provisions of section 70 of the Act may be applicable. In *Thomas Abraham v. National Tyre and Rubber Company*, (1973)3 S.C.C.458= A.I.R.1974 S.C.602, the observations already extracted supra, clearly establish that the principles to prevent unjust enrichment and order restitution could be clearly invoked even to the case of delivery of money. The observations in the pronouncements of the highest Court in the land settle the principle beyond any controversy. Furthermore, the following passage in Cheshire and Fifoot's Law of Contract, Tenth Edition, do indicate that the case of payment of money could also come within the operation of the rule.

"The plaintiff may have paid money to the defendant in pursuance of a transaction which he thought to be a valid contract, but which in truth, through the operation of some rule of law, is null and void. As a matter of logic such money should be recoverable in quasi-contract. The hypothesis upon which its payment rested is erroneous, and, as the event shows, it was in fact paid for nothing at all. This logical conclusion is, as a general rule, accepted by the common law."

Equally so, paragraph 1964 in Chitty on Contract, Twenty-fifth Edition, already extracted above, also contemplates the invocation of the principle where money has been paid.

29. Mr. T.R.Rajagopalan, learned Counsel for the defendants, would contend that in the absence of specific pleadings under section 70 of the Act, this court shall not countenance a prayer for refund of the money paid. In support of this submission of his, learned counsel would rely on two pronouncements of the Supreme Court. The first is the one reported in *Union of India v. Sita Ram*, (1976)4 S.C.C.505= A.I.R.1977 S.C.329. There, the Supreme Court, after adverting to the three ingredients to support the cause of action under section 70 of the Act, found on facts that the plaint lacked two essential features to constitute a cause of action under section 70 of the Act and they were that the respondent delivered the goods lawfully to the appellant and that the appellant enjoyed the benefits thereof. We do not think that the plaint in the present case should be construed as totally lacking in the essential features under section 70 of the Act. We will come to the factual discussion shortly. The other pronouncement is the one reported in *Devi Sahai v. Union of India*, (1976)4 S.C.C.763= A.I.R.1977 S.C.2082. There, the only dispute raised on behalf of the appellant was that the respondent did not deliver vacant possession in accordance with the contract and therefore, the respondent is liable for mesne profits. On examination of the plaint, the Supreme Court found that there is no allegation in the plaint to support any pleading under section 70 of the Act. Such is not the factual position here and this, we say, on our construction of the pleadings in the present case. In *Raja Mohan v. Manzoor Ahmad*, (1943) 70 I.A.1= (1943)1 M.L.J.508= A.I.R.1943 P.C.29 the Privy Council discountenanced the attitude of Courts towards the question of pleadings being unduly rigid especially when the defendant did voice forth a counter case with regard to the relief asked for and he could not be stated to have been taken by surprise by any relief claimed. In *Kedar Lal v. Hari Lal*, 1952 S.C.J.37= 1952 S.C.R.179= (1952)1 M.L.J. 431= 65 L.W.179= A.I.R.1952 S.C.47, with regard to the construction of pleadings and the method of computation, the following observations occurring in paragraphs 51 and 41 of the judgment are elucidative:

"I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs." Page 52.

"... The method of computation is a matter of law and it is for the Judges to apply the law to the facts stated and give the plaintiff such relief as is appropriate to the case." Page 51

30. In *Ram Nagina Singh v. Governor General in Council*, A.I.R.1952 Calcutta 306, it was observed that there was preponderance of authority in favour of the view that if the facts of a case could be fairly brought within the terms of section 70 of the Act and the conditions expressly laid down therein were satisfied, the section should be given effect to and applied irrespective of the fact that there was in fact no contract between the parties.

31. In *Nagubai v. B.Sharma Rao*, 1956

S.C.J.655= 1956 S.C.R.451= A.I.R.1956 S.C.593, the Supreme Court countenanced that though evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence, yet, the rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, ever when no specific issue has been framed thereon and evidence adduced relating thereto and, in those circumstances, the absence of a specific pleading on the question was a mere irregularity, which resulted in no prejudice to the parties.

32. In *Dominion of India v. Pretty Kumar*, A.I.R.1958 Patna 203, a Bench of the Patna High Court held that though the plaintiff in his plaint did not refer to section 70 of the Act, yet, from the materials on record if it could be gathered that the ingredients of section 70 of the Act are present, the Court shall not be justified in refusing relief to the plaintiff. In *R.P.Kamalia Mills v. State of Bihar*, A.I.R.1963 Patna 153, it was countenanced that although the plaintiff did not refer to section 70 of the Act in the plaint, yet, if the facts disclosed either in the plaint or in the written statement are sufficient for giving relief to either party there can be no bar to the application of the provisions of section 70 of the Act.

33. In *Bhagwati v. Chandramauli*, (1966) 2 S.C.R.286= (1971) S.C.J.666= A.I.R.1966 S.C.735, the position with regard to pleadings and grant of relief was set out in the following terms:

> "There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new..."
>
> "But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another." Page 738

34. In *Hansraj Gupta and Company v. Union of India*, (1973)2 S.C.W.R.509: A.I.R. 1973 S.C.2724, the Supreme Court observed as follows:

> "We may now turn to the plaintiff's claim to the benefit of section 70 of the Contract Act put forward in this Court for the first time. It was urged, on the strength of *Piloo Dhunjishaw Sidhwa v. Municipal Corporation of the City of Poona*, (1973)3 S.C.R.415= (1971)1 S.C.J.119= (1971) M.P.L.J.695=

A.I.R.1970 S.C.1201, that, so long as the claim is there, this Court is not precluded from applying section 70 of the Contract Act for the first time even on appeal by special leave. We, however, think that the conditions for the applicability of this Section must at least be set out in the pleadings and proved." Page.516

35. In *R.G.Vakil v. Ramendra Nath Banerjee*, (1984) 88 Cal.W.N.905= A.I.R. 1984 N.O.C.303 Calcutta, page 149, it was countenanced,

> "If the plea has not been specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence."

36. Coming to the facts of the present case, in paragraph 3 of the plaint, the plaintiff has referred to the alternative relief in the following terms:

> "... If however, the Court is of the opinion that the plaintiff is not entitled to specific performance of the contract for sale of the suit property the defendants may be directed to pay to the plaintiff the sum of Rs.80,000/- (Rupees eighty thousand only) received by him, with future interest at the rate of 6% per annum."

In the prayer in paragraph 6, the plaintiff has asked for the following relief:

> "... or in the alternative, the plaintiff be allowed to recover from the defendants the sum of Rs.80,000/- (eighty thousand) only with future interest at the rate of 6% per annum till the date of recovery."

The original written statement of the first defendant with regard to the payment of Rs.50,000/- sets forth the following allegation:

> "In connection with the marriage of the defendant's son who is an advocate with the plaintiff's daughter, it was agreed by the plaintiff that he shall pay Rs.50,000/- to the defendant for the purpose of defraying the marriage expenses as well as for conveying a suitable property by this defendant in favour of the plaintiff's daughter. Accordingly the plaintiff gave a draft for Rs.50,000/- in favour of the defendant on 23.6.1976 the date of the draft being 21.6.1976. As per that agreement the defendant executed a sale deed of his property consisting of nearly 1 3/4 acres of yielding coconut garden and 1 1/2 acres of planted rubber area in favour of the plaintiff's daughter on 23.6.1976 itself. The plaintiff had inspected the properties and had selected the same and with his knowledge, consent and approval alone the sale deed was executed. In the sale deed the consideration was mentioned less to save the registration expenses. It was the plaintiff who spent for the registration of that document. Because he had to meet the expense he suggested that the consideration be given at a low figure and that the document be registered in Kulathoor Sub Registrar's Office in Kerala .. .. The draft for 50,000/- was received and the amount was utilised in the manner stated above.."

Paragraph 1 of the additional written statement of the first defendant on this aspect runs as follows:

> "The alternative claim made for the return of Rs.80,000/- is baseless and is quite untenable. In so far as there was no agreement to sell the property, the question of return of Rs.80,000/- does not arise. The only amount received was Rs.50,000/- and the circumstances under which, and the purpose for which the said amount was received has been already stated in paragraph 4 of the written statement dated 7.3.1977."

Additional issue No.2 framed on 14.10.1977 adverts to the questions as to whether the alternative claim for return of Rs. 80,000/- is tenable in case the Court is

of the opinion that the plaintiff is not entitled to specific performance of the contract for sale of the suit property. Prior to the suit, there was exchange of notices. In Ex.A-2 dated 23.10.1976 the plaintiff has made a demand for return of the amounts paid. There was a reply as per Ex.A-3 dated 2.11.1976 and, of course, the first defendant has put forth his answer of adjustment and discharge with regard to this payment of Rs. 50,000/-. Ex.A-4 is the rejoinder dated 23.11.1976. Here again, the plaintiff has consciously made the demand for the return of the amounts paid. These notices have been referred to in the plaint. The fact that there was a payment of Rs.50,000/- by the plaintiff to the first defendant has been set out in the plaint. Though the plaintiff would state that the payment was made in pursuance of an oral agreement of sale, the factum of payment to and receipt by the first defendant is not in issue in the case. The first defendant only puts forth an answer of adjustment and discharge. We are eschewing this case of the first defendant on facts. It is not the case of either the plaintiff or the first defendant that the payment was a gratuitous one. The first defendant obviously enjoyed the benefit of the same. All the three essential ingredients under section 70 of the Act come out on the basis of the pleadings put forth by the parties and the factual materials disclosed in the case. The non-reference to section 70 of the Act is a matter of no consequence. The parties knew that the return of the money paid was very much in issue. We find that a specific issue has been raised relating to this controversy. The parties placed their evidence on this issue. The first defendant could not be stated to have been taken by surprise by any new plea. We are not able to spell out that there is no indication in the plaint for a case under section 70 of the Act and the essential ingredients of section 70 of the Act have not come out from the pleadings as a whole. Hence, we could not countenance the contention put forth by the learned counsel for the defendants that on account of lack of pleading, this Court shall nc indulge in granting the alternative relie of return of the money paid.

37. The last lap of the discussion in th judgment is meant to cover the case c the first defendant that a sum c Rs.50,000/- was paid to serve differer purposes and the said purposes got serve and hence, there is no question of refur of this sum of Rs.50,000/-. In the repl notice, Ex.A-3 dated 2.11.1976, the fir: defendant only stated that the amour was given to him for the purpose c defraying the marriage expenses as we as for conveying a suitable property t him in favour of the plaintiff's daughte There is no indication as to what wa the quantum that should be allocated fc the marriage expenses and what was th quantum that should be appropriate towards the sale of a property in favou of the plaintiff's daughter. In the origina written statement of the first defendan also, we do not get any indication of th apportionment of this sum of Rs.50,000/ for each of these two items, namely marriage expenses and consideration fc sale in favour of the plaintiff's daughter The additional written statement of th first defendant is also portently siler on this aspect. The first defendant wa examined as D.W.1. It is only for the firs time in his evidence, the first defendar ventured to speak about the allocatio and appropriation of the sum of Rs.50,000/ under the two heads. He would depos that Rs.40,000/- was meant for th property and Rs.10,000/- was meant fc the marriage expenses. The plaintif examined as P.W.1, has stated that th marriage expenses should be borne by th respective parties and that is the custo in his community. On the other hand, D.W. would state that there is a custom tha the bride's party pays for the marriag expenses. Apart from D.W.1, none ha been examined to establish this custo in the community. We cannot lose sigl of the fact that the first defendant a person who received the sum c Rs.50,000/- and if he wants to say tha the sum of Rs.50,000/- was adjuste towards particular expenses, he mu:

demonstrate it before this court by convincing evidence. D.W.2 is none else than the son-in-law of the first defendant and he also speaks about Rs.40,000/- being meant for the purchase of a property and Rs.10,000/- being meant for marriage expenses. D.W.3 is the second defendant, who married the plaintiff's daughter, and he also deposes to the above effect. The details of the marriage expenses to the tune of Rs.10,000/- have not been exposed. We cannot take the bare statements of the first defendant and his witnesses, for the first time coming in the course of evidence, that a substantial sum of Rs.10,000/- was appropriated towards the marriage expenses, in the absence of details therefor. We also find that while the plaintiff was in the box, as P.W.1, no suggestion was put to him specifically that this sum of Rs.10,000/- was meant for the marriage expenses. We are not satisfied on evidence that the first defendant could claim appropriation of the sum of Rs.10,000/- out of the sum of Rs.50,000/- towards marriage expenses and put forth an answer for the claim of the plaintiff to this extent.

38. The case of the first defendant is that a sum of Rs.40,000/- was appropriated towards the sale of a property by him to the plaintiff's daughter, P.W.3. The deed of sale dated 23.6.1976 has been marked as Ex.A-12. The consideration quoted therein is only Rs.13,000/-. Neither in Ex.A-3 nor in the written statements, original and additional, the first defendant put forth a case that a sum of Rs.40,000/- was appropriated towards this sale. The evidence of D.W.1 is that Ex.A-12 was registered at 12 noon on 23.6.1976 and the draft for Rs.50,000/- was encashed only at 1.30 P.M. on that day. The registration endorsement on Ex.A-12 shows that the document was presented for registration at 11 A.M. on 23.6.1976. The recitals in Ex.A-12 are to the effect that the cash of Rs.13,000/- was received by the vendor, the first defendant, from the vendee, P.W.3, from out of the amount which she received from her father, the plaintiff. There is no reference in the document to the payment by draft. The draft itself was encashed subsequently. Apparently we do not find any nexus between the draft and the payment made for Ex.A-12. It is not the case of either party that cash was paid before the Registrar and hence, the adverse comment by the learned counsel for the defendants in this behalf is of no avail to his clients. It is true, in the course of evidence, the plaintiff, as P.W.1, would depose that Rs.30,000/- was given for purchasing the property in the name of his daughter, P.W.3, who also supports this version of the plaintiff. Learned counsel for the defendants would state that there is contradiction in the evidence, in that in Ex.A-11 dated 23.10.1976 and Ex.B-10 dated 23.11.1976, the counsel notices issued on behalf of P.W.3, only Rs.13,000/- was stated to have been paid for the sale deed, Ex.A-12. Mr.S.Chellaswami, learned counsel for the plaintiff, would submit that if the averments in Ex.B-11 and B-10 should be put and used against P.W.3, she ought to have been confronted with them while she was being examined in Court, so that she could have had an opportunity of explaining them and clearing up the point of ambiguity or dispute, and in the present case, it was not so done. For this proposition, learned counsel for the plaintiff relies on a pronouncement of the Supreme Court in *Sita Ram v. Ramchandra*, (1977)2 S.C.C. 49= (1977)2 S.C.R.671= A.I.R.1977 S.C.1712. We find that this is the factual position. But we need not stand straining over this aspect because we are duty bound to go by the principle of burden of proof in the present case. The first defendant, who wants to wipe out this sum of Rs.50,000/- which he admittedly received, must demonstrate that there was in fact due adjustment and discharge of this amount as pleaded by him, by placing convincing and unimpeachable evidence therefor. Learned counsel for the defendants would state that the property conveyed under Ex.A-12 was worth much more than the value quoted in the document and the very evidence of the plaintiff and his daughter supports the case of the defendants. The first defendant's specific case is that Rs.40,000/- was appropriated towards Ex.A-12. The plaintiff's evidence is that the consideration for the sale under Ex.A-12 was paid separately and it was Rs.30,000/-. Both the cases stand irreconcilable and the endeavour on the

part of the learned counsel for the defendants to reconcile them and to persuade this Court to draw the inference that the real consideration for Ex.A-12 ought to have been Rs.40,000/- and it came out of the draft for Rs.50,000/- cannot succeed. The first defendant must discharge his burden and he must do so to the satisfaction of the Court. The recital in Ex.A-12 being specific that cash was paid and the document having been presented for registration at 11 A.M. it is not possible to establish a nexus between Ex.A-12 and the draft for Rs.50,000/-, which admittedly got encashed only at 1.30 P.M. The evidence placed on behalf of the defendants has not persuaded us to accept their case that Rs.40,000/- was appropriated out of the sum of Rs.50,000/- towards the consideration for Ex.A-12. If this is the factual position which we could deduce from the evidence placed in the case, then, we find no answer for the claim of the plaintiff for the refund of this sum of Rs.50,000/-.

39. The result is, this appeal is allowed to the following extent, only.

i) The judgment and decree of the Court below, dismissing the suit of the plaintiff in toto with costs, are set aside;

ii) the plaintiff is granted a decree for Rs.50,000/- with interest thereon at 6 per cent per annum from 23.6.1976 till date of realisation, recoverable from the first defendant, and

iii) the plaintiff is entitled to proportionate costs, both in the suit as well as in this appeal from the first defendant.

R.S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *V.Ratnam, J.*

*W.P.No.7163 of 1983 and C.R.P.No.3300 of 1983. *7th February,* 1985.

Methala Balarama Veetil Vannathan Veetil Pathooty Umma, Pallor, Mahe *Petitioner**

v.

The Administrator, Mahe, Appellate Authority, Under Mahe Land Reforms Act and others *Respondents.*

Constitution of India (1950), Article 226 - Mahe Land Reforms Act, 1968, section. 85 (Proviso) - "Order is in force" - Meaning of.

A, kudikidappukari in P's land filed an application under section 88-A of the Mahe Land Reforms (Amendment) Act, 1980 to purchase the kudikidappu. The petition was allowed. Against that order 'P' preferred an appeal before the appellate authority and obtained a stay of the order appealed against. "P" then filed an application before the Land Tribunal, Mahe under section 85(1) read with section 83(2)(c) of the Act to direct A to shift the kudikidappu to another property. This application was dismissed by the Land Tribunal, Mahe and the representations before the Administration, Mahe were also summarily rejected.

Held:- A reading of section 85(1) of the Act indicates that the failure on the part of the kudikidappukaran to comply with the requisition made under section 83(2) or section 83(4) confers the right to the person in possession of the land to make an application under section 85(1) to the Tribunal having jurisdiction to entertain an application under section 88-B. This right is not in any manner connected or interwined with the right of the kudikidappukaran to purchase the kudikidappu. No doubt, the second proviso to section 85(1) is to the effect that if an order under section 88-B(3) of the Act allowing the

application for the purchase of the kudikidappu had been passed and such an order is in force, then the Tribunal is precluded from entertaining the application.

In this case, the order for purchase of the kudikidappu was passed on 13.8.1982 and that order was stayed between 12.10.1982 and 5.9.1983. The application for shifting was filed by the petitioner on 10.3.1983, when the stay order was in force. In this case, therefore, though an order for the purchase of the kudikidappu had been passed on 13.8.1982, yet, such an order was not in force at the time when the application for shifting under section 85(1) of the Act was made by the petitioner. Therefore, the second proviso cannot be invoked to reject the application for shifting filed by the petitioner. [Paras.2,3]

Case referred to:-

The State of U.P. v. Mohamed Nooh, 1958 S.C.J.242= (1958) M.L.J. (Crl.) 197= 1958 S.C.R.595= A.I.R.1958 S.C.86.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of certiorarified mandamus directing the Land Tribunal, Mahe to entertain the petition of the petitioner under section 85 of the Mahe Land Reforms Act and to quash the order dated 5.4.1983 passed by the Land Tribunal, Mahe, etc.

O.K.Sridevi, for Petitioner.

S.Govindasamy, Government Pleader and *A.M.Ebrahim*, for Respondents.

The Court made the following

ORDER:- The writ petition and the civil revision petition are dealt with together as the petitioner and the main contesting respondents are the same and closely interconnected questions arise for decision. The circumstances giving rise to these proceedings may be briefly stated as under. The petitioner (for short in the writ petition as well as the civil revision petition) is the owner of Survey No.354/2 and Survey No.392/2 (corresponding to R.S.No.84/4) within the desam of Palloor Mahe. The third respondent in the writ petition (hereinafter referred to as the Kudikidappukari) (who is the same as the first respondent in the civil revision petition) was living in a portion of Survey No.392/2. She claimed rights as Kudikidappu to Survey No.354/2 and also offered to pay the expenses therefor. Though it appears that the Kudikidappukari orally agreed to do so, nevertheless, she filed an application for recognising her as Kudikidappukari and on 30.11.1973, an order was passed in Rc/A2/3284/71 under the provisions of Mahe Land Reforms Act, as they stood then, with reference to an extent of 3 cents of land in Survey No.392/2 inclusive of the structure put up by kudikidappukari. However, the right of purchase was not available to kudikidappukari as per the provisions of the Mahe Land Reforms Act, as they stood then. Subsequently, Mahe Land Reforms Act, 1968, was amended by The Mahe Land Reforms (Amendment) Act, 1980 (Act No.1 of 1981) (hereinafter referred to as the Act) under the terms of which Kudikidappukari was also given the right to purchase the Kudikidappu. Thereupon, the Kudikidappukari filed Original Application No.7 of 1981-K under section 88-A of the Act for the purchase of the kudikidappu of an extent of five cents in accordance with the provisions of the Act. Though certain objections were raised by the petitioner, the Land Tribunal, Mahe, by its order dated 13.8.1982, on a purported consideration of the evidence, proceeded to over-rule the objections so raised by the petitioner and allowed the application filed by Kudikidappukari for the purpose of five cents of land in R.S.No.84/4 on deposit of Rs.328-25 which was arrived at as the share of price payable to the landowner. Against that order, the petitioner preferred an appeal before the Appellate Authority (Land Reforms), Mahe, in A.A.No.2 of 1983. Pending disposal of the appeal, in I.A.No.2 of 1982 in A.A.O.No.2 of 1982, the petitioner applied for and obtained stay of the order appealed against and the appellate authority granted stay on 12.10.1982 which was continued upto 5.9.1983. During the pendency of

A.A.No.2 of 1982 before the Appellate Authority (Land Reforms, Mahe), the petitioner served notice on kudikidappukari on 22.2.1983 demanding her to shift her kudikidappu from Re-survey No.84/4 in order to enable the petitioner to put up a residential house for her son with a view to establish a family for him. Though the notice so sent by the petitioner was received by Kudikidappukari on 25.2.1983, she did not shift her kudikidappu. Thereupon, the petitioner filed on 4.4.1983 an application before the Land Tribunal, Mahe, under section 85(1) read with section 83(2)(a) of the Act. In that application, the petitioner, after referring to the passing of orders in O.A.No.7 of 1981 and the pendency of the appeal in A.A.No.2 of 1982 and the issue of a notice on 22.2.1983 and the refusal of the kudikidappukari to shift the kudikidappu, prayed that an order may be passed directing the Kudikidappukari to shift the kudikidappu to the B schedule property of an extent of five cents forming part of old Survey No.354. On that application, the Land Tribunal, Mahe, passed an order on 5.4.1983 to the following effect:

> "The advocate for the petitioner has been informed that at this stage this petition cannot be entertained by this court. Hence no action."

Against this order, the petitioner made representations before the Administrator, Mahe, who held that the act of entertaining or rejecting an application is purely an administrative function. The representations made by the petitioner were summarily rejected. Claiming that it is the statutory duty of the Tribunal functioning under the Act to entertain and consider the application for shifting and complaining that it had erroneously declined to perform its duty on the ground that it was an administrative order, the petitioner filed the writ petition to quash the order dated 5.4.1983 passed by the Land Tribunal and to direct it to entertain and dispose of the petition filed by the petitioner under section 85 of the Act. The appeal filed by the petitioner in A.A.No.2 of 1983 was heard by the Appellate Authority (Land Reforms), Mahe, and on 7.4.1983, the Appellate Authority concluded that the advocate for the petitioner has failed to prove that the shifting of the kudikidappu has to be made for *bona fide* purpose of constructing a residential house for her son and that the petitioner was only attempting to defeat the rights of the kudikidappukari. Though several other objections were raised in the memorandum of appeal, none of them were either gone into or discussed, but finally, the appeal was dismissed. It is the correctness of this order that is challenged in the civil revision petition preferred under section 113 of the Act.

2. From the facts set out above, it is seen that the question that arises for consideration in the writ petition is, whether the Land Tribunal, Mahe, was in order in having declined to entertain the petition filed by the petitioner under section 85(1) of the Act. There is no dispute that the petition filed by the petitioner was under the provisions of the Act. Section 83(2) provides for the eviction of the kudikidappukaran, if the person in possession of the land for constructing a building for his own residence or for the residence of any member of his family including major sons and daughters. Section 83(4) provides for the shifting of the Kudikidappukaran to another part of the land fit for locating the kudikidappu if the location of the kudikidappu is such as to cause inconvenience to a person in possession of land in which there is a kudikidappu. Under section 85(1), if the kudikidappukaran does not comply with the requisition made under sub-section (2) or sub-section (4) of section 83 by the person in possession of the land to shift to a new site, then, such person may apply to the Land Tribunal having jurisdiction to entertain an application under section 88-B in respect of the kudikidappu to be shifted, to enforce compliance with such requisition. The second proviso to section 85(1) is important and it runs as follows:-

> "Provided further that the Land Tribunal shall not entertain any application under this sub-section in respect of a kudikidappu, if an order under sub-section (3) of section 88-B allowing an application for the purchase of that

kudikidappu has been passed and such order IS IN FORCE." (Underlining mine).

Under Section 88-B, a kudikidappukaran entitled under section 88-A to purchase the kudikidappu occupied by him and lands adjoining thereto may apply to the Land Tribunal and the Land Tribunal is empowered to dispose of the application after giving notice to the kudikidappukars and other persons interested and after such enquiry as may be prescribed. The proviso to section 88-B(3) is to the effect that where an application under sub-section (1) of section 85 in respect of the kudikidappu is pending, the Land Tribunal shall not pass any order under this sub-section before the disposal of that application. In the light of the aforesaid provisions, it has to be considered whether the authorities below were right in having acted in the manner they did. A reading of section 85(1) of the Act indicates that the failure on the part of the kudikidappukaran to comply with the requisition made under section 83(2) or section 83(4) confers the right to the person in possession of the land to make an application under section 85(1) to the Tribunal having jurisdiction to entertain an application under section 88-B. This right is not in any manner connected or inter-twined with the right of the kudikidappukaran to purchase the kudikidappu. No doubt, the second proviso to section 85(1) is to the effect that if an order under Section 88-B(3) of the Act allowing the application for the purchase of the kudikidappu had been passed and such an order is in force, then, the Tribunal is precluded from entertaining the application and a corresponding restriction upon the exercise of the powers to enable the purchase of the kudikidappu by the kudikidappukaran is found in the proviso to section 88-B(3) of the Act. In other words, a combined reading of section 85(1) and the second proviso of section 85(1) and the proviso to section 88-B(3) shows that the request for shifting and the request for the purchase have to be dealt with taking into account the passing of an order under section 88-B(3) or the pendency of an application under section 85(1) of the Act, as the case may be. To put differently, the application for shifting under section 85(1) cannot be entertained, if an order under sub-section (3) of section 88-B of the Act allowing the application for the purchase of the kudikidappu had been passed and that order is in force. Likewise, under the proviso to section 88-B(3), if an application for shifting is pending under section 85(1) of the Act, then, the Tribunal cannot pass an order for purchase of the kudikidappu until after the disposal of the application for shifting. It is in the context of the provisions referred to above and on the facts of this case, that the correctness of the orders passed has to be decided.

3. Earlier, it has been seen how in this case the order for purchase of the kudikidappu was passed on 13.8.1982 and how that order was stayed between 12.10.82 and 5.9.1983. The application for shifting was filed by the petitioner on 10.3.1983 when they stay order was in force. In other words, the present case would be one to which the second proviso to section 85(1) of the Act is not attracted, for, though the order for purchase was passed on 13.8.1982, on an application by the kudikidappukari in O.A.No.7 of 1981, the operation of that order was suspended between 12.10.1982 and 5.9.1983 during which period, the application for shifting was made by the petitioner under section 85(1) of the Act on 10.3.1983. In this case, therefore, though an order for purchase of the kudikidappu had been passed on 13.8.1982, yet, such an order was not in force at the time when the application for shifting under section 85(1) of the Act was made by the petitioner. Therefore, the second proviso cannot be invoked to reject the application for shifting filed by the petitioner. Though it is pointed out by the Supreme Court in *The State of Uttar Pradesh v. Mohamed Noon*, 1958 S.C.J.242= (1958) M.L.J. (Crl.) 197= 1958 S.C.R.595= A.I.R.1958 S.C.86 at page 95 that whatever may be the theory under other systems of law, under the Indian Law and procedure, an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where a decree on appeal is merely one of dismissal and that the filing of an appeal or revision may at best put the decree or order in jeopardy but till it

is reversed or modified, it remains effective, on the facts of this case, it is found that by reason of orders of stay, which admittedly subsisted between 12.10.1982 and 5.9.1983, the orders passed by the Tribunal under section 88-B(3) of the Act was not in force at the time when the application under section 85(1) for shifting the kudikidappu was made by the petitioner. Under those circumstances, the Land Tribunal was in error in having declined to entertain the application for shifting filed by the petitioner under section 85(1) of the Act. That order of the Land Tribunal dated 5.4.1983 and the confirmation thereof by the appellate authority cannot, therefore, be sustained and deserve to be quashed.

4. That leaves for consideration the civil revision petition arising on the merits of the order passed by the Land Tribunal as well as the appellate authority. It is seen from the record that the petitioner had raised several objections with reference to the market value of the property and the non-impleading of other persons interested in the property as well as the encumbrancer in whose favour a security over the property had been created. There is no reference at all in the order of the appellate authority to any one of these aspects. All that is stated in the order is that the advocate of the petitioner has failed to prove that the shifting of the kudikidappukari has to be made for *bona fide* purpose of constructing a residential house for the son of the appellant. The appellate authority has not adverted to those aspects touching upon the market value, the effect of the non-impleading of the persons interested, especially minors and the encumbrancer. The only ground for rejecting the appeal of the petitioner is that the counsel for the petitioner had failed to prove that the request for shifting of the kudikidappu is *bona fide*. It is difficult to understand as to how the counsel can prove the *bona fides*, unless it be that it can be established by the materials on record. There is absolutely no indication that the appellate authority had taken into account any of the materials available or record before concluding that the requirement for construction of a residential house for the son of the petitioner is not *bona fide*. There has been a total failure on the part of the Land Tribunal as well as the appellate authority to advert to the relevant matters as well as the evidence with reference to the application for the purchase of kudikidappu made by the kudikidappukari in the light of the objections raised by the petitioner. In other words, neither the Land Tribunal nor the Appellate Authority has riveted its attention on the vitals of the matter in deciding the application filed by the kudikidappukari for the purchase of the kudikidappu. Under those circumstances, those orders cannot be sustained. The orders of the Land Tribunal as well as the Appellate Authority are not based on a consideration of the materials available and cannot, therefore, be stated to be reasoned orders. Those orders cannot therefore be maintained. While exercising revisional powers under section 113 of the Act, it is open to this Court to pass such orders as this court deems fit and on a careful consideration of the entire matter, this court is of the view that the Land Tribunal as well as the appellate authority have totally and completely failed to discharge their duties in considering the statutory application filed by the kudikidappukari for the purchase of the kudikidappu and also the application for shifting filed by the petitioner. The order of the authorities cannot, therefore, be sustained.

5. In the result, the order of the Land Tribunal, Mahe, dated 5.4.1983 holding that the application for shifting filed by the petitioner under section 85(1) of the Act cannot be entertained as well as the order of the Appellate Authority that the order of the Land Tribunal was purely in the exercise of administrative functions are quashed and the Land Tribunal, Mahe, is directed to entertain the application for shifting filed by the petitioner and dispose of the same on its merits. In view of the very unsatisfactory disposal of the application for the purchase made by the authorities below, the orders passed by the Land Tribunal dated 13.8.1982 as well that of the Appellate Authority passed on 7.4.1983 are set aside and O.A.No.7 of 1981-K is remitted to the Land

Tribunal, Mahe, to be reconsidered and dealt with in the light of the evidence and materials and also the objections raised by the petitioner. The petitioner and the kudikidappukari are at liberty to place such oral as well as documentary evidence as they deem fit before the Land Tribunal in the course of the remanded enquiry. The Land Tribunal is further directed to first deal with the application for shifting filed by the petitioner under section 85(1) of the Act and thereafter proceed to deal with and dispose of the application for the purchase of the kudikidappu as provided under the proviso to section 88-B(3) of the Act. In the result, the *rule nisi* is made absolute and the writ petition is allowed. The civil revision petition is also allowed. There will be no order as to costs.

B.S. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

Present:- *R.Sengottuvelan, J.*

*Diary No.388 of 1984. 21*st November*, 1984.

Dexter S.Anthony *Petitioner**

v.

June P.Anthony and another *Respondents.*

(A) Divorce Act (IV of 1869), sections 10, 18 and 23 - Petition for divorce - Jurisdiction of District Court and the High Court - Not concurrent.

(B) Divorce Act (4 of 1869), section 3(4) - "Court" - Definition.

(C) Letters Patent, Clause 35.

On an analysis of the provisions of the Indian Divorce Act conferring jurisdiction on the High Court and the District Court and the clause 35 of the Letters Patent the proposition that the High Court and the District Court can exercise concurrent jurisdiction in matters arising under sections 10, 18 and 23 of the Divorce Act cannot be accepted. *[Para.8]*

In this case in view of the preponderance of judicial opinion and also in view of the fact that the petitioner and the respondent have last resided within the jurisdiction of the District Court of Chengelpattu, the High Court will have no jurisdiction to entertain the suit for Divorce. *[Para.10]*

Case referred to:-

Mrs. Kamala Nair v. N.P.Kumaran Nair, A.I.R.1958 Bombay 12.

Suit praying that this court be pleased to pass a decree dissolving the marriage of the petitioner with the respondent, and to pay the costs of this petition.

The Court made the following

ORDER:- The reference in the above Diary No.388 of 1984 raises an interesting question relating to the matrimonial jurisdiction of this Court. The petitioner presented an application under section 10 of the Indian Divorce Act for the relief of divorce of the marriage of the petitioner with the respondent. In paragraph 6 of the application it is stated as follows:

> "After the marriage the petitioner and the respondent lived and cohabitated as husband and wife first at Little Mount, Saidapet, Madras, for five years, and then at Guindy, Madras, for three years and lastly at Kennedy Valley, Moosaranpet, Madras-600 091, until February, 1983, when the respondent left the petitioner in the following circumstances."

2. Moosaranpet is within the jurisdiction of the District Court of Chengalpattu. According to the office note the petition for divorce has to be filed in the District Court within whose jurisdiction both the parties last resided. The office also points out two conflicting judgments of this Court relating to jurisdiction and seeks clarification in the matter. Balasubrahmanyan, J. in Diary No.6509 of 1975, held that in respect of petition under sections 8, 10 and 23 of the Indian Divorce Act, the High Court and the District Court within whose jurisdiction the petitioner and the respondent last resided has got concurrent jurisdiction, disagreeing with the earlier views expressed by Sadasivam, J. and Sethuraman, J. The office also points out another judgment of Fakkir Mohammed, J. in O.M.S.No.1 of 1978, holding that in such cases only the District Court has got jurisdiction. In view of the divergence of the views expressed we have to consider the matter in detail and come to a conclusion regarding the question of jurisdiction.

3. Before proceeding to discuss the question of jurisdiction it will be useful to state the relevant provisions of law regarding jurisdiction in respect of the cases arising under the Indian Divorce Act, 1869, hereinafter referred to as the Act.

4. The preamble to the Indian Divorce Act 4 of 1969 is as follows

> "Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial, it is hereby enacted as follows:

Section 2 of the Act lays down that the Act extends to the whole of India except the State of Jammu and Kashmir. Section 3 of the Act relates to the interpretation of clauses with reference to several terms appearing in the Act. According to section 3(1) "High Court" means, with reference to any area in a State, the High Court for that State and in the case of any petition under the Act, "High Court" means the High Court for the area where the husband and wife reside or last resided together. According to section 3(2) "District Judge" means a Judge of a Principal Civil Court of original jurisdiction however designated. Section 3(3) of the Act defined the "District Court" as follows.

> "District Court", means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together."

According to section 3(4) "Court" means the High Court or the District Court, as the case may be. Section 4 of the Act deals with the manner of exercise of jurisdiction by the High Court in matrimonial cases and is as follows:

> "The jurisdiction now exercised by the High Courts in respect of divorce a mensa et toro and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise, except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed."

5. Sections 10,18 and 23 enable an individual to whom Indian Divorce Act applies to present a petition for dissolution of the marriage, declaration of nullity of marriage and for judicial separation, respectively, to the High Court or the District Court.

6. The contention of the petitioner is that the abovesaid sections conferring jurisdiction taken together will mean that in respect of cases arising under sections 10, 18 and 23, the High Court of Madras will have concurrent jurisdiction along with the District Court throughout the State of Tamil Nadu. The points urged in support of this contention are as follows.

1. In sections 10, 18 and 23 it is stated that a petition for the appropriate relief can be made to the District Court or

to the High Court.

2. As per section 3(1) of the Act High Court means, with reference to any area in a State, the High Court for that State and in the case of any petition under the Act, it means the High Court for the area where the husband and wife reside or last resided together. According to section 3(3) of the Act the District Court means in the case of any petition under the Act the court of the District Judge within the local limits of whose ordinary jurisdiction, or within whose jurisdiction under the Act, the husband and wife reside or last resided together. The wording of sections 10, 18 and 23 taken along with the above definition will indicate that both the Courts will have concurrent jurisdiction.

3. According to Clause 35 of the Letters Patent the High Court is vested with matrimonial jurisdiction throughout the state.

7. In support of the petitioner's contention reliance is placed upon the decision of Balasubrahmanyan, J. in Diary No.6509 of 1975 (O.M.S.No.21 of 1975), where it was held that this Court has got jurisdiction to entertain applications under sections 10, 18 and 23 even in cases of spouses who have last resided outside the jurisdiction of this Court on the basis that in such cases the District Court and the High Court have concurrent jurisdiction.

8. On an analysis of the provisions of [illegible] conferring jurisdiction on the High Court [illegible] the District Court and the Clause 35 of Letters Patent I am not able to persuade myself to accept the proposition that the High Court and the District Court can exercise concurrent jurisdiction in matters arising under Sections 10,18 and 23 of the Act, for the following reasons:-

1. According to the preamble to the Act the Courts will have to exercise such jurisdiction as is conferred under the Act in matters matrimonial;

2. As per section 3(4) of the Act "Court" means the High Court or the District Court, as the case may be. If it was the intention of the framers of the Act that the High Court should exercise concurrent jurisdiction along with the District Court then the phrase "as the case may be" occurring in section 3(4) of the Act will have no meaning,

3. The provision that an application is to be made to the High Court or the District Court in sections 10,18 and 23 will have to be taken along with the definition of "Court" occurring in section 3(4) of the Act, and it must be construed only to mean the High Court in respect of areas comprised in the original jurisdiction of the High Court and the District Court for which the District Judge is deemed to be the Judge exercising principal civil Court's original jurisdiction.

4. Coming to a conclusion that the High Court will have the concurrent jurisdiction along with the District Court in matrimonial matters on account of the use of the words High Court or the District Court will not go in conformity with the provision in section 3(4) of the Act,

5. Even in Clause 35 of the Letters Patent there is a provision by which the jurisdiction of the Courts not established by the Royal Charter are preserved. Clause 35 is as follows

> "*Matrimonial jurisdiction:*- And we do further ordain that the said High Court of Madras shall have jurisdiction, within the Presidency of Madras in matters matrimonial between our subjects professing the Christian religion, Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by the Royal Charter within the said Presidency lawfully possessed thereof."

As per the proviso to clause 35 the said jurisdiction vested with the District Court cannot be interfered with. If a concurrent jurisdiction is meant, there is no need for the proviso to Clause 35 of the Letters Patent. In the case reported in *Mrs. Kamala Nair v. N.P.Kumaran Nair*, A.I.R.

1958 Bombay 12 Chagle, Chief Justice, in interpreting Clause 35 of the Letters Patent (Bombay) has held that the matrimonial Jurisdiction of the High Court provided in Clause 35 cannot be exercised in cases where a specific provision is made in a specific enactment.

6. Sections 16 and 20 of the Act provide for confirmation of the decree of the District Court in respect of divorce and declaration regarding nullity by the High Court. These provisions will also indicate that there cannot be a concurrent jurisdiction exercisable by the High Court as well as the District Court.

7. According to section 6 of the Act suits pending at the time of the commencement of the Act at any High Court shall be decided by such Court. This enabling provision indicates that the High Court has no jurisdiction in cases that arise after the Act where the spouses last resided outside the original jurisdiction of this Court.

8. The speech of Honourable Mr.Maine in the Legislative Council on 26th March, 1869, Fort St., George Gazette, March 31st, 1869, P-6, indicate that the Legislature never intended to confer a concurrent jurisdiction on both the High Court and the District Court. The relevant portion of the speech quoted at pages 74 and 75 of the law of Divorce by the Hon'ble Sir Henry Rattigan, Kt, second edition, is extracted below -

> "On the question whether the District Courts should be allowed a jurisdiction in divorce cases, there was a difference of opinion. The main reason why the Select Committee had given this jurisdiction was that the refusal of it would amount to a denial of relief to large classes of persons affected by the Bill. It would be a mere mockery of Europeans and East Indians in distant cities, and Native Christians in mofussil villages, to tell them to come to the High Courts in the Presidency towns for judgments of divorce. It is however said that the District Courts are not equal to those duties. That argument is one which should be looked upon with great distrust. If it be established that certain new legal rights and remedies should be created for the benefit of any class of Her Majesty's subjects, and the Indian Courts are incompetent to administer them, the proper inference should be that the Courts should be reformed, not that the rights and remedies should be refused. But the charge is, in truth, often hastily made, and, moreover, there is nothing specially difficult in questions of divorce. They are important on account of their social importance, but for the most part, involve very simple questions of fact ... If, however, it be once granted that the District Courts must have jurisdiction, their exercise of it is, by this Act fenced round with many safeguards. The High Court can call up at any time any case that presents special difficulty... The Act applies to the decrees of District Courts the same principle which is applied in India to capital sentences, and requires that they be confirmed by the High Court. And the High Court has full powers of calling for fresh evidence".

9. Section 8 of the Act deals with the extraordinary jurisdiction of the High Court to withdraw any case pending before the Court of any District Judge for the purpose of trying it as a Court of original jurisdiction. The very use of the expression "extraordinary jurisdiction" indicates that the High Court has no ordinary jurisdiction in the areas outside its original jurisdiction in respect of cases arising under the Act.

10. For the above reasons I am not inclined to agree with Balasubrahmanyan, J. in his conclusion that in cases of applications under sections 10, 18 and 23 both the High Court and the District Court concerned are vested with the concurrent jurisdiction. The contention that this Court has got concurrent jurisdiction had been negatived by Sadasivam, J. in O.M.S.No.13 of 1963, Sethuraman, J. in Diary No.1680 of 1974 and Fakir Mohammed, J. in O.M.S.No.1 of 1978. The learned Judges in the abovesaid three cases have taken into consideration the proviso to Clause 35 of the Letters Patent and the definition

of 'Court' occurring in Section 3(4) of the Act and negatived the plea that this Court is to exercise concurrent jurisdiction along with the District Court concerned in matters arising under sections 10,18 and 23. I am inclined to agree with the preponderence of Judicial opinion in this regard and hold that in view of the fact that the petitioner and the respondent have last resided within the jurisdiction of the District Court of Chengalpattu, this Court will have no jurisdiction to entertain the above suit. I answer the reference on the above lines.

R.S. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *V.Ratnam, J.*

*W.P.No.2474 of 1984. *31st January*, 1985.

The Tamil Nadu Government Officials Union, Manaparai, Taluk, represented by its Secretary, R.Paramasivam *Petitioner**

v.

The Government of Tamil Nadu, represented by Commissioner and Secretary to Government, Health and Family Welfare Department, Madras-9 and another

Respondents.

Constitution of India (1950), Article 226 - Persons serving in non-governmental institution - Taken over by Government and appointed to Govt. service - Whether entitled to have past service considered by Government for purposes of service benefits - Government order in Letter No.26968/81 - 18 Health dated 7.1.64 to the petitioner quashed.

On the question whether officers from a non-Governmental institution taken over by Government and absorbed in Government service (to wit Health Inspectors at the Gandhigram Rural Institute) with effect from a specified date would be entitled to have their service prior to that date in the original institution taken into account for any service benefits under the Government,

Held:- There is absolutely no justification to totally obliterate the past experience and services rendered by the Health Inspectors in the Rural Institute and to consider them as new extrants only from the date of their appointment to Government service for purposes of extending to them other service benefits, especially when they were faced with one of two alternatives, either to join the service as offered or to quit. The Government should take into account the past services put in by the petitioners in Rural Institute while considering their entitlement to promotional and other service benefits.

[Para.5]

State of Orissa v. N.N.Swamy, (1977)2 S.C.C.508= A.I.R.1977 S.C.1237, applied.

Cases referred to:-

M.N.Swamy v. State, A.I.R.1974 Orissa 186, *State of Orissa v. N.N.Swamy,* (1977)2 S.C.C.508= (1977) Lab.I.C.558= (1977)2 S.C.R.774= A.I.R.1977 S.C.1237.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of Certiorarified Mandamus calling for the records relating to the order of the First Respondent in Letter No.26968/L1/81-18, Health, dated 7.1.1984 and quash the same and direct the respondents to take into account the period prior to 1.4.1975 for the purpose of Selection Grade post and for other service benefits under the State Government Service.

D.Raju for *A.Sivaji, M.Ramachandran* and *R.Meenalochini,* for Petitioner.

J.Kanakaraj, Additional Government Pleader for Writs, for Respondents.

The Court made the following

ORDER:- In this writ petition at the instance of the Tamil Nadu Government Officials Union, Manaparai Taluk, Tiruchy District, represented by its Secretary, the petitioner-Union has prayed for the issue of a writ of certiorarified mandamus calling for the records relating to the order of the first respondent herein in its Letter No.26968/81-18, Health, dated 7.1.1984, and quash the same and also for a further direction that the respondents should take into account the period of service rendered by the Health Inspectors prior to 1.4.1973 for purposes of other service benefits.

2. The circumstances leading to the filing of the writ petition are as under. Nearly about 19 persons, whose names are listed in paragraph 2 of the affidavit filed in support of the writ petition, were originally appointed as Health Inspectors at the Gandhigram Rural Institute and Pilot Health Project, Gandhigram, Dindigul, Madurai District (hereinafter referred to as 'the Rural Institute'). Though the Health Inspectors were working under the management of the Rural Institute, they were supervised and controlled by the State Government through the District Family Welfare Officer. The salary of the Health Inspectors was also being paid only by the State Government. By G.O.Ms.No.1456, Health and Family Planning Department, dated 12.6.1973, the State Government took over the administrative control over the Rural Institute's Regional Family Planning Welfare Centre with reference to Athoor Block. The Government further directed that the Health Inspectors, numbering about 20, in the Block shall be taken over from the Institute of Health and Family Planning, Gandhigram, with retrospective effect from 1.4.1973. By yet another G.O.Ms.No.2131, Health and Family Planning Department, dated 27.8.1973, certain amendments to the Special Rules for the Tamil Nadu Public Health Subordinate Service were made and with reference to the Health Inspectors in the Rural Institute, Gandhigram, it was provided that those amendments shall be applicable to them with effect from 16.9.1968. In so far as the Health Inspectors who were formerly working in the Rural Institute and taken over are concerned, their service prior to 1.4.1973 had not been taken into account and it is the complaint of the petitioner-Union that the services rendered by its members in the Rural Institute for several years past should not be totally ignored or overlooked and that in so far as G.O.Ms.No.1456, Health and Family Planning Department, dated 12.6.1973, took over the services of the Health Inspectors in the Rural Institute only with effect from 1.4.1973, it resulted in the members of the petitioner-Union being deprived of the past service rendered by them for availing service benefits. On a representation made by the petitioner-Union, the first respondent sent the impugned communication dated 7.1.1984 to the effect that the request of the Health Inspectors absorbed in Government Service with effect from 1.4.1973 from the Rural Institute, Gandhigram, to count their services prior to 1.4.1973 in the Institute for purposes of advancement to selection grade post and for other service benefits is inadmissible and stood rejected. It is to quash this communication, the petitioner-Union has come up before this Court praying for the reliefs set out earlier.

3. In the counter filed on behalf of the respondents, they took up the position that the Health Inspectors formerly working in the Rural Institute were absorbed into Government service only with effect from 1.4.1973 and as such, their service prior to that date cannot be taken into account for any service benefits under the Government and, therefore, the rejection of the request of the members of the petitioner-Union in that regard was in order.

4. The learned Counsel for the petitioner-Union contended that the Health Inspectors whose services had been taken over by the State Government under G.O.Ms.No.1456, Health and Family Planning Department, dated 12.6.1973, had put in different periods of service in the Rural Institute where they were serving earlier and the State Government while taking them over from the Rural Institute with

retrospective effect from 1.4.1973, cannot totally ignore the period of their past services in the Rural Institute for purposes of considering the promotional and other service benefits. Strong reliance in this connection was placed by the learned counsel for the petitioner-Union upon the decision in *N.N.Swamy v. State*, A.I.R.1974 Orissa 186 confirmed by the Supreme Court in *State of Orissa v. N.N.Swamy*, (1977)2 S.C.C.508= A.I.R.1977 S.C.1237. On the other hand, the learned Additional Government Pleader submitted that the taking over of the services of the members of the petitioner-Union Government servants was only from 1.4.1973, though the relevant Government Order in that regard was passed on 12.6.1973 and having regard to the terms of the Government Order providing for the taking over of the services of the Health Inspectors of the Rural Institute, the petitioner-Union or its members cannot be heard to contend that the period of their past services ought to be reckoned for purposes of other service benefits as well as promotional opportunities.

5. There is no dispute that most of the Health Inspectors whose services were taken over by the State Government under G.O.Ms.No.1456, Health and Family Planning Department, dated 12.6.1973, had put in different periods of service as Health Inspectors in the Rural Institute. Their services were not so taken over with effect from 1.4.1973. But, at the same time, G.O.Ms.No.1456, Health and Family Planning Department, dated 12.6.1973, does not make any provision whatever with reference to the period of service already rendered by the Health Inspectors in the Rural Institute. In other words, those Health Inspectors who were absorbed and treated as Government servants were regarded as new entrants into Government service with effect from 1.4.1973. There is nothing to indicate in the said Government Order as to why or on what grounds the State Government was inclined to totally ignore the period of past services rendered by the Health Inspectors in the Rural Institute. Almost under identical circumstances, the Orissa High Court in *N.N.Swamy v. State*, A.I.R.1974 Orissa 186 had to consider the question with reference to the take-over of a private college. The take-over of the college was on 9.3.1971 and the members of the staff in the taken-over college were issued appointment orders to the effect that they were temporarily appointed on an *ad hoc* basis for a period not exceeding six months with effect from the fore-noon of 9.3.1971. The question arose whether those persons could claim that their past services in the private college should also be taken into account for considering their chances for promotion as Readers. In that context, the Orissa High Court pointed out that we cannot lose sight of the fact that when the take-over was decided at the level of the management on one side and the Government on the other, most of the teachers in the college had no other way out, but to opt to accept service under the new employer. Having served the college for several years, they had crossed the age bar for recruitment into Government service and by not opting to accept the service under the Government by exercising the option as offered they faced the apprehension of loss of service and that there was absolutely no rationale behind the decision of total obliteration of the experience gathered by them as teachers in the college before the take-over. The Court was also of the view that such a condition ought not to have been imposed at all. This decision of the Orissa High Court was affirmed on appeal by the Supreme Court in *State of Orissa v. N.N.Swamy*, (1977) Lab.I.C.558= (1977)2 S.C.R.774= (1977)2 S.C.C.508= A.I.R.1977 S.C.1237. At page 1241, the Supreme Court has observed as follows.

> "When a fairly well-recognised institution, as in this case, run for more than a century, is completely taken over by the Government for management, it is not merely taking over the land and buildings, tables and chairs. It has to tackle at the same time, a human problem, that is to say, the fate of the teachers and the staff serving in that institution. The institution, with which we are concerned, was taken over, by consent, as a going educational concern and it goes without saying that it must be administered on sound lines having regard to quality,

> efficiency and progress in all respects. It is understandable that the employees had to join the new service under the Government, for the first time, and so could be, in that sense, fresh entrants. But to say that the teaching experience of the Readers in the private institution is completely effaced to the extent that they will not be even eligible, on the plea of absence of teaching experience in Government service, for consideration for appointment as Readers is a seriously grim issue."

Finally, the Supreme Court directed that the prior teaching experience should also be taken into account to consider their eligibility for appointment as Readers, though their suitability to the posts was directed to be decided by the Public Service Commission. The only difference between the cases referred to above and the one on hand is that Lecturers were concerned in those cases, while, we have a similar problem with reference to Health Inspectors here. There is absolutely no justification whatever to totally obliterate the past experience and services rendered by the Health Inspectors in the Rural Institute, and to consider them as new entrants only with effect from 1.4.1973 for purposes of extending to them other service benefits, especially when they were faced with one of two alternatives, either to join the services as offered or to quit. Under those circumstances, the communication of the first respondent in Letter No.26968/L1/82-18, Health, dated 7.1.1984, cannot at all be sustained and it is quashed accordingly. The respondents are also further directed to take into account the past services put in by the Health Inspectors in the Rural Institute while considering their entitlement to promotional and other service benefits. The rule is made absolute. There will be no order as to costs.

B.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

Present:- *R. Sengottuvelan, J.*

*C.S.No.435 of 1984 and Application No. 5504 of 1984. *26th March*, 1985.

Preethi Creations represented by Partner P.Ramadas *Plaintiff**

v.

T.A.P.Enterprises represented by Partner C.N.Basha *Defendant.*

(A) Civil Procedure Code (V of 1908); Order 38, rule 5 - Attachment before judgment when can be ordered - Suit by one partnership firm against another for money due - Petition by the plaintiff for attachment before judgment - Individual property of a partner sought to be attached - Petition not competent.

(B) Civil Procedure Code (V of 1908), Order 21, rule 50(1)(a).

According to rule 50(1)(a) of Order 21 of the Civil Procedure Code in respect of a decree against the partnership firm, in cases where the defendant had appeared in his own name under Rule 6 or 7 of Order 30 or a person who has admitted on the pleading that he is or had been found to be a partner of the partnership firm, his property can be proceeded against. Just as there are provisions in the Code of Civil Procedure for proceedings against the property of the partners for realising the decree against the partnership firm, there is no provision under Order 38, rule 5 of the Code for passing an order of conditional attachment of the property of the partner for debt due from the partnership firm. *[Paras. 9,10]*

In view of the fact that the provision under Order 38, rule 5 is an extraordinary provision the same will have to be strictly followed or else it will result in injury to parties to litigation. It is not possible

to construe the words "his property" occurring in sub-clauses (a) and (b) of sub-rule (1) of rule 5. Order 38 as the property of an individual partner in a suit in which the partnership firm alone figures as the defendant. Under the circumstances to say that in a suit against the partnership firm an order of attachment before judgment under Order 38, rule 5 cannot be passed in respect of the individual property of a partner merits acceptance. The case would be different if the partner is also added as a party defendant to the suit in view of the fact that he is liable for the partnership debt. In this case the partner has not been individually made a party defendant. Under the circumstances the only conclusion that can be arrived at is that the applicant is not entitled to an order of conditional attachment under Order 38, rule 5 of the Code in respect of the individual property of a partner.

[Para.12]

Cases referred to:-

Bharat Sarvodaya Mills v. Mohatta Bros., A.I.R.1969 Guj.178; *Rodriques v. Speyer Brothers*, (1919) A.C.59; *Purushottam Umedbhai and Co. v. M/s.Manilal and Sons*, (1961)1 S.C.J.283= (1961)1 M.L.J. (S.C.) 38= (1961)1 An.W.R. (S.C.)38= (1961)1 S.C.R.982= A.I.R.1961 S.C.325; *Western National Bank of City of New York v. Perez, Tuisanna and Co.*, (1891)1 Q.B.304; *Shantilal v. Pranlal*, A.I.R.1952 Kutch 47.

Application praying that an order of attachment before Judgment of the immovable property belonging to the defendant/respondent viz., House, Ground and Premises No.15, Malony Road, T.Nagar, Madras-17 be ordered and that the costs of this application be costs in the cause.

P.P.Chandra Zoya, for Plaintiff.

V.R.Bikshheswaran, for Defendant.

The Court made the following

ORDER:- This is an application by the plaintiff for attachment before judgment of the properties of one of the partners of the defendant firm under Order 38, rule 5, Civil Procedure Code, read with Order 14, rule 8 of the Original Side Rules.

2. The facts of the case are briefly as follows.- The applicant/Plaintiff viz., a partnership firm, filed the above suit for recovering a sum of Rs.1,00,000/- due from the respondent/defendant, which is also a partnership firm. The claim arises out of an agreement under which the respondent agreed to pay Rs.13,50,000/- as lease consideration to the applicant for taking on lease the exploitation rights of a Tamil Talkie Picture all over the world. At the time of the release of the picture the respondent was not able to pay the entire consideration and had to leave an arrear of Rs.1,35,000/-. The applicant refused to deliver any print for release till the payment of the entire consideration. The respondent assured that he will withhold the release of the picture in the districts of Madurai and Ramanathapuram as security for the balance of consideration and also undertook not to take delivery of the prints kept ready for release in the districts of Madurai and Ramanathapuram from Gemini Colour Laboratory without paying the balance consideration. The respondent has also undertaken to pay the abovesaid balance consideration within one week from 14.3.1984. The respondent failed to pay the said balance. A sum of Rs.35,000/- was paid out of adjustment and the balance of Rs.1,00,000/- is due and hence the above suit is filed for the recovery of the same.

3. The respondent has purchased the exploitation rights of another Tamil Talkie Picture from a third party and the applicant herein filed Application No.2159 of 1984 to attach such rights, where initially an injunction was ordered on 22.11.1984. Despite such orders the respondent cleverly manipulated and fabricated a false agreement and released the picture totally defeating the rights of the applicant.

4. The respondent has virtually violated his undertaking not to release the picture in Madurai and Ramanathapuram districts by releasing the same in Sivam Theatre, Madurai, surreptitiously through third parties utilising prints delivered for exploitation in other areas and thus committed

applicant has filed a separate suit C.S.No.756 of 1984 on the file of this Court. In the said case despite notice in the interlocutory application the respondent failed to enter appearance. In the present case though the respondent had initially entered appearance through a counsel, subsequently the said counsel when sought to be served with notice in the application refused to receive it stating that he had no instructions from the party on this matter. Thus, the respondent has been exhibiting fraudulent intention and a total indifference to the lawful claim of the applicant.

5. The respondent is heavily involved in debts and he has to pay huge amounts to Ganapathy Vel Murugan Combines and Gemini Colour Laboratory, apart from other sundry creditors.

6. The respondent partner is possessed of only one property viz., House, ground and premises bearing No.15. Malony Road, T.Nagar, Madras-17, which is also encumbered. The property will be worth about Rs.15,00,000/-. The respondent with intent to defeat and delay the claim of the creditors, is attempting to alienate the said property and to secrete the proceeds therefrom beyond the reach of the creditors. If, the respondent is allowed to do so, the applicant will be left with no means of realising the fruits of the decree. In the interests of justice and to safeguard the rights of the applicant, the above said property will have to be attached before judgment.

7. Mr.V.R.Biksheswaran, learned counsel for the respondent, took notice of the application and contended that this application is not maintainable for the following reasons:-

(1) An order of attachment before judgment can be passed only in respect of the properties of the respondent, which is the partnership firm;

(2) the property sought to be attached is an individual property of a partner of the firm and the same cannot be attached before judgment in pursuance of a debt due from the partnership firm.

8. Order 38, rule 5 enables the Court to call upon the defendant to furnish security and in default order attachment of the property of the defendant before judgment. The said provision is reproduced below:

"(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him.

(a) is about to dispose of the whole or any part of his property, or,

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

The wording of above Rule indicates that an order to be passed under this Rule can only be with reference to the property of the defendant. This can be inferred from the sub-clauses (a) and (b) of sub-rule 1 of Rule 5, where the phrase 'his property' occurs. Relying on this rule Mr.V.R.Biksheswaran, learned counsel, contends that an order under Order 38, rule 5, C.P.C. can be passed only with reference to the property of the defendant and in this case the defendant is a partnership firm and as such an order of attachment before judgment can only be passed

in respect of the properties of the firm which is a defendant in this case. In other words, the contention is that an order of attachment before judgment cannot be made in respect of the individual properties of the partner of a firm since the partner has not been added as a party to the suit in his individual capacity.

9. Mr.K.Ravi, learned Counsel for the applicant, contends that a partner is always liable for the debts of the partnership firm and in view of this liability the individual property of the partner of a firm can also be attached before judgment. The proposition that every partner is liable to answer the liabilities of the partnership firm is an obvious proposition. But the question whether the property of a partner can be attached before judgment in a suit where the partnership alone is the defendant is to be considered in this application. On behalf of the applicant reliance is placed upon Order 21, rule 50, Civil Procedure Code which provides for execution of a decree against the firm. The said Rule is as follows -

> "(1) Where a decree has been passed against a firm, execution may be granted -
>
> (a) against any property of the partnership,
>
> (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be a partner,
>
> (c) against any person who has been individually served as a partner with a summons and has failed to appear,
>
> Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 30 of the Indian Partnership Act, 1932 (9 of 1982).
>
> (2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.
>
> (3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.
>
> (4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer."

According to Rule 50(1)(a) of Order 21 a decree against the partnership can be executed straightaway against the partnership property. According to Rule 50(1)(b) in cases where the defendant had appeared in his own name under Rule 6 or rule 7 of Order 30 or a person who has admitted on the pleadings that he is or he had been found to be a partner of the partnership firm, his property can be proceeded against for a decree against the partnership firm. In this case the sole defendant is the partnership firm T.A.P.Enterprises, represented by its partner C.N.Basha. The said C.N.Basha is not denying that he is the partner of the firm. Hence by virtue of Order 20, rule 50, C.P.C. if a decree is obtained against the firm the property of C.N.Basha can be proceeded against. But the question is whether the same principle can be applied to an attachment before judgment.

10. Just as there are provision in the Code of Civil Procedure for proceedings against the property of the partners for realising the decree against the partnership firm, there is no provision under Order 38, rule 5, Civil Procedure Code, for passing an order of conditional attachment of the property of the partner for the debt due

from the partnership. It is contended that in view of the fact that in cases where attachment before judgment is made no fresh attachment need be made in respect of the same property after the passing of the decree and the same attachment may become attachment for purpose of execution of the decree, the principle applicable to the attachment in the course of the execution of the decree applies in all force to attachment before judgment and hence in view of Order 21, rule 50, Civil Procedure Code the individual property of a partner can be attached before judgment in a suit against the partnership. In support of this contention the case reported in *Bharat Sarvodaya Mills v. Mohatta Bros*, A.I.R.1969 Gujarat 178 is cited. In that decision it has been observed as follows:

> "A suit by or in the name of a firm is thus really a suit by or in the name of all its partners. See *Rodriquez v. Speyer Brothers*, (1919 A.C.59 and *Purushottam Umedbhai and Co. v. M/s.Manilal and Sons*, (1961)1 S.C.J.283= (1961)1 M.L.J. (S.C.) 38= (1961)1 An.W.R. (S.C.) 38= (1961)1 S.C.R.982= A.I.R.1961 S.C.325 at pages 328, 329, 330. So also a suit against the firm is really a suit against all the partners of the firm. Their lordships quoted a passage of Lindley L.J. in *Western National Bank of City of New York v. Perez, Trisanna and Company*, (1891)1 Q.B.304 at P.314 as under -
>
> "When a firm's name is used, it is only a convenient method of denoting those persons who compose the firm at the time, when that name is used and a plaintiff who sues partners in the name of the their firm in truth sues them individually, just as much as if he had set out all their names."
>
> The decree passed in the suit, though in form against the firm, is in effect a decree against all the partners. ... From this subsequent decision by their Lordships of the Supreme Court it appears to be a setttled position that such suits by or against a firm under Order 30 are in reality suits by partners or against the partners at the time when the cause of action accrued. There is no question of a deemed fiction, but in reality of the suit is by all the partners or against all the partners, even though firm name is used as a convenient method of denoting those persons who compose the firm at the time when the cause of action accrued. In such cases even though the plaint in the cause title mentions name of the firm as the plaintiff, the suit is really by all the partners individually, just as much as if they had all of them set out their names in the plaint."

The above observation of the Gujarat High Court is only a reiteration of the principle laid down in Order 30 Civil Procedure Code, which relates to the institution of suits by or against the partnership firms. But the execution of decrees passed against a firm is governed by Order 21, rule 50, Civil Procedure Code. According to the said rule a decree against the firm can be executed against the property of a partner, if he had appeared in the suit in his own name representing the partnership under rule 6 or rule 7 of Order 30, or in cases where he admitted to be a partner of the firm or he had been adjudged as a partner of the firm. Hence the abovesaid rules in the Code of Civil Procedure contain specific provision enabling a decree holder against a firm to attach and bring to sale the individual property of the partners in execution of a decree.

11. The provisions regarding the attachment before judgment under Order 38 rule 5 is an extraordinary one by which the plaintiff can secure the property of the defendant if the conditions laid down in that section are present. The said provision cannot be applied to the individual property of a partner in a suit against the partnership firm. The proposition had been considered by the Judicial Commissioner of Kutch, in the case reported in *Shantilal v. Pranlal*, A.I.R.1952 Kutch 47 where the following observation is found.

> "Under Order 38, rule 5 a plaintiff can ask for attachment before judgment of the property of his defendant and not of the property of a partnership

of which the defendnat is a partner as the partnership property cannot be called 'his property' within the meaning of that expression used in clauses (a) and (b) of sub-rule (1) of the rule 5, Order 38."

12. In view of the fact that the provision under Order 38, rule 5, Civil Procedure Code is an extraordinary provision the same will have to be strictly followed or else it will result in injury to parties to the litigation. It is not possible to construe the words "his property" occurring in sub-clauses (a) and (b) of sub-rule (1) of rule 5. Order 38 as the property of an individual partner in a suit in which the partnership firm alone figures as the defendant. Under the circumstances the contention of the respondent that in a suit against the partnership firm an order of attachment before judgment under Order 38, rule 5 cannot be passed in respect of the individual property of a partner merits acceptance. The case would be different if the partner is also added as a party defendant to the suit in view of the fact that he is liable for the partnership debt. In this case the partner has not been individually made as a party defendant. Under the circumstances the only conclusion that can be arrived at is that the applicant is not entitled to an order of conditional attachment under Order 38, rule 5, Civil Procedure Code, in respect of the individual property of a partner.

13. In the result the application for attachment before judgment is dismissed. However, there will be no order as to costs.

B.S. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

Present:- *G.Ramanujam* and *V.Ratnam, JJ.*

*Writ Appeal No.527 of 1978 and W.P.No. 4426 of 1977. *5th December, 1984.*

K.Ramaprasad *Appellant**

v.

Record Officer and Special Tahsildar, No.1, Tenancy Record, Madurai and others *Respondents.*

Tamil Nadu Land Reforms (Record of Tenancy Rights) Act (XXV of 1969) - Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), section 4(B) - Scope - Does not exclude oral tenancy - Petitioner's name entered in record of tenancy as cultivating tenant - Effect of - Insertion of section 4-B.

It is no doubt true that section 4-B of Act XXV of 1955 contemplates the execution of a lease deed between the landlord and the cultivating tenant after the coming into force of Madras Cultivating Tenants Protection (Amendment) Act, 1956, in triplicate and one copy to be lodged in the Taluk Office. A penalty is provided for either refusal to sign or failure to lodge the lease deed with the Taluk office. But the question is whether the non-execution of a lease deed as contemplated in section 4-B will deprive, the parties of the benefits of the provisions of the Act. Admittedly section 4-B does not contain any forfeiture clause to the effect that if the landlord or the cultivating tenant refused or failed to execute the lease deed, they will forfeit the benefits arising under the Act. The purpose of the Act is to confer benefits on the cultivating tenants and to protect them from unjust eviction. If such a right given to the cultivating tenant is to be taken away or withdrawn, one would expect a specific provision in section 4-B, of the Act for forfeiture for not executing a lease deed as contemplated therein. The object of section

4-B is to see that after 1956, the parties enter into agreements in writing which would be in triplicate and one copy is to be deposited with the Taluk Office. Such a requirement has been made in section 4, only to see that there is no dispute between the landlord and the tenant as to the exact terms of the tenancy. If the terms of the tenancy are reduced to writing and a copy of the same is deposited with the Taluk office, then the terms of the tenancy cannot be put in dispute and the rights of the parties could be decided with reference to those terms contained in the lease deed in proceedings under the Act initiated or resorted to by the parties. *[Para.9]*

Sub-section 3 of section 4-B imposes a fine for non-compliance with section 4-B. It applies only to a case where one party to the tenancy agreement is willing to execute the agreement but the other party refuses to sign the same. In such a case, the refusal is made punishable. If the landlord and the cultivating tenant do not want to enter into a written agreement, then neither the proviso to section 4-B, nor sub-section 3 of section 4(B) will stand attracted and there is no way of compelling both the parties to enter into a written tenancy agreement. *[Para.10]*

So long as section 4-B does not exclude oral tenancies, persons holding under oral tenancies cannot be deprived of the benefits of the Act merely on the basis of oral tenancies. It is significant to note that even after the introduction of section 4-B by the Amending Act 1956, the definition of the term 'cultivating tenant' still continues to be the same and that definition takes the oral tenancies as well. Unless that definition was amended so as to confine the operation of the Act only to tenancies under written agreement, the application of the Act to oral tenancies cannot be excluded. *[Para.10]*

Case referred to:-

Sakuntala v. Thandukkaran, (1965) 68 L.W. 362.

Appeal under Clause 15 of the Letters Patent against the Order of Mr.Justice Mohan dated 10.1.1978 and made in exercise of the Special Original Jurisdi of the High Court in Writ Petition No. of 1977 presented under Article 22(the Constitution of India to issue a of *Certiorari* calling for the records 3rd respondent in R.P.No.A.10/9-77 16.7.1977 confirming the order of Revenue Divisional Officer in A.P.No dated 2.4.73 which confirmed the of the Tahsildar in Form IV 139/71 dated 9.8.1972 and quash the same.

N.V.Balasubramaniam, for Appellant.

C.Chinnaswami, Special Government Pl for Respondents 1 to 3.

K.Mohan Ram, for 4th Respondent.

The Judgment of the Court was deli by

Ramanujam, J.:- This appeal is dire against the judgment of Mohan, J. c 10.1.1978 made in Writ Petition No. of 1977.

2. The appellant herein is the lan and he filed an application before Record Officer for removal of the f respondent's name from the recor tenancy in respect of seventy cent land in S.No.34/4 and 12 cents of in S.No.33/6 in the village of Keelama kattinam, Madurai South Taluk. The en on the said petition was taken up b Record Officer and in the said enc the appellant herein contended that fourth respondent herein was not a t at all either on waram basis or Kuthagai basis, that he was engaged as an agricultural labourer to watch water the land in question for whic was paid four bags of paddy as v and that therefore, the fourth respo cannot be registered as a tenant the provisions of the Record of Ter Act, 1969. As against this, the f respondent contended that he is a vating tenant of the appellant for last thirteen years and that he has paying kuthagai regularly and that t fore, the record of tenancy does require any alteration.

3. As a result of the said enquiry,

Record Officer held that the fourth respondent is a cultivating tenant directly cultivating the lands in question and that therefore the entries in the record of tenancy do not require any modification or variation. The appellant took the matter on appeal to the Revenue Divisional Officer, Madurai who is the appellate authority, but without success. Thereafter, the appellant took the matter in revision before the Additional Collector, Madurai where also he failed. Thereafter the appellant moved this court under Article 226 of the Constitution of India by way of filing Writ Petition No.4426 of 1977 praying for the issue of a writ of *Certiorari* to quash the order dated 16.7.1977 passed by the third respondent, the revisional authority, confirming the order of the Revenue Divisional Officer, dated 2.4.1973 which in turn confirmed the Order of the Tahsildar dated 9.2.1972.

4. It is seen from the impugned proceedings that the appellant apart from questioning the orders of the authorities on merits, has also raised the contention that the provisions of the Tamil Nadu Cultivating Tenants' Protection Act, 1955, after the introduction of section 4-B, do not recognise an oral tenancy, and a person who claims to be a tenant on the basis of an oral tenancy cannot claim the benefits of the Act in view of section 4-B of the Act. This contention was negatived by the third respondent, the revisional authority, on the ground that notwithstanding the introduction of section 4-B, the definition of the term "cultivating tenant" which contemplates even an implied tenancy, has not been amended, that therefore even after the insertion of section 4-B in the Act, there can be an oral tenancy and that the fact that there is no written agreement evidencing the tenancy will not disable a tenant from claiming the benefits of the Act.

5. At the stage of the writ petition itself, the only ground urged before the learned single Judge was with regard to the scope of section 4-B of the Act. The legal point based on the scope of section 4-B of the Tamil Nadu Cultivating Tenants Protection Act, 1955 urged by the learned counsel for the appellant was this. Whatever be the position before the insertion of section 4-B of the Act, after such insertion, there cannot be any oral tenancy at all, that all tenancies entered into subsequent to 1956 when section 4-B was inserted, can only be under a written agreement, that such a written agreement should be in triplicate and a copy of the same should be filed in the Taluk Office, and that if either the landlord or the tenant refused to sign the written agreement, he will be liable to a penalty upto fifty rupees under the provisions of section 4-B of the Act. The fact that the statute has chosen to levy a penalty for non-compliance with the provisions of section 4-B would itself indicate that the said section is mandatory and that unless the mandatory provisions of the Act are complied with, a tenant cannot claim benefits under the Act. This contention was rejected by Mohan, J. on the ground that the question is covered by the decision of Kailasam, J. (as he then was) in *Sakuntala v. Thandukkaran*, (1965) 78 L.W.362 wherein the learned Judge has held that even after 1956, there can be an oral tenancy and that a tenant under an implied oral agreement can claim the benefits of the Act notwithstanding the fact that section 4-B of the Act has not been complied with.

6. Though the learned Counsel for the appellant challenges the view taken by the learned single Judge on the ground that the scope of section 4-B of the Act has not been properly considered by him we are of the view that the learned Judge has come to the right conclusion. In view of the contention of the learned counsel for the appellant that whatever be the position before 1956, after the introduction of section 4-B in 1956, all tenancies can only be in writing and an oral tenancy cannot be recognised in view of the said section and that in any event all tenancy agreements after the introduction of section 4-B in 1956, can only be in the form of a written agreement prepared in triplicate as contemplated by section 4-B, it is necessary to refer to the relevant statutory provisions which have got a bearing on the question referred to above.

7. The Tamil Nadu Cultivating Tenants

Protection Act, 1955 is intended to protect the cultivating tenants in certain areas in the State of Tamil Nadu from unjust eviction. The term 'cultivating tenant' is defined in section 2(aa) as follows -

> "*Section 2(aa):* "Cultivating tenant" (i) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied, and
> (ii) includes -
> (a) any such person who continues in possession of the land after the determination of the tenancy agreement,
>
> (b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land,
>
> (c) and (d) ...."

The definition of the term "cultivating tenant" throws considerable light on the question raised by the learned counsel for the appellant. This definition talks of a tenancy agreement, express or implied. A tenancy agreement can be implied from the conduct of the parties. That means that there can also be an oral tenancy agreement. The definition also contemplates a person continuing in possession after the termination of the tenancy agreement, which means that there need not be any subsisting agreement in writing to claim the benefits of the Act as a cultivating tenant. The definition also includes the heir of a deceased cultivating tenant, and in such a case there could not have been any written agreement as contemplated in section 4-B. Thus, the definition of the term "cultivating tenant" does not exclude an oral tenancy agreement. As already stated, the object of the Act being to protect the cultivating tenant from unreasonable and unjust eviction, the application of the Act cannot be restricted only to tenants under a written agreement.

8. It is no doubt true that section 4-B of the Act directs that in the case of every tenancy agreement entered into after the coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, between a cultivating tenant and a landlord, a lease deed shall be executed in triplicate in the prescribed form within a reasonable time after the commencement of such tenancy, specifying the name and description of the cultivating tenant, the name (if any), survey number, description and extent of the land leased out and the terms of the tenancy, and shall be signed both by the landlord or his agent and by the cultivating tenant. One of the three copies shall be kept by the landlord, one shall be kept by the cultivating tenant and the third shall be caused to be lodged in the Taluk office by the landlord or his agent within a fortnight of the date on which the cultivating tenant signs it. The proviso to sub-section (1) of section 4-B says that, if there is a refusal or delay to execute the lease deed, it shall be open to the cultivating tenant or the landlord as the case may be to lodge the deed in the taluk office with a declaration that the other party has refused or delayed unreasonably to execute it. Sub-section (3) of section 4-B lays down that, if the landlord or his agent or the cultivating tenant refuses to sign or fails to lodge the lease deed in accordance with the provisions of sub-section (1), the Revenue Divisional Officer may impose on the landlord or the cultivating tenant, as the case may be, a penalty which may extend to fifty rupees and that the penalty so imposed may be recovered as if it were an arrear of land revenue.

9. It is no doubt true that section 4-B contemplates the execution of a lease deed between the landlord and the cultivating tenant after the coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956 in triplicate and one copy to be lodged in the Taluk Office. A penalty is provided for either refusal to sign or failure to lodge the lease deed with the Taluk Office. But the question is whether the non-execution of a lease deed as contemplated in section 4-B will deprive the parties of the benefits of the provisions of the Act. Admittedly, section 4-B does not contain any forfeiture clause to the effect that,

if the landlord or the cultivating tenant refused or failed to execute the lease deed, they will forfeit the benefits arising under the Act. As already stated, the purpose of the Act is to confer benefits on the cultivating tenants and to protect them from unjust eviction. If such a right given to the cultivating tenant is to be taken away or withdrawn, one would expect a specific provision in section 4-B of the Act for forfeiture for not executing a lease deed as contemplated therein. No doubt, the object of section 4-B is to see that after 1956, the parties enter into agreements in writing which would be in triplicate and one copy is to be deposited with the Taluk Office. Such a requirement has been made in section 4-B only to see that there is no dispute between the landlord and the tenant as to the exact terms of the tenancy. If the terms of the tenancy are reduced to writing and a copy of the same is deposited with the Taluk Office, then the terms of the tenancy cannot be put in dispute and the rights of the parties could be decided with reference to those terms contained in the lease deed in proceedings under the Act initiated or resorted to by the parties.

10. The learned counsel for the appellant contends that sub-section (3) of section 4-B imposes a fine for non-compliance of section 4-B and this shows that section 4-B is mandatory. Sub-section (3) of section 4-B of the Act applies only to a case where one party to the tenancy agreement is willing to execute the agreement but the other party refuses to sign the same. In such a case, the refusal is made punishable. From this it is not possible to say that there cannot be any oral tenancy at all. If the landlord and the cultivating tenant do not want to enter into a written agreement, then neither the proviso to section 4-B, nor sub-section (3) of section 4-B will stand attracted and there is no way of compelling both the parties to enter into a written tenancy agreement. Apart from these aspects, so long as section 4-B does not exclude oral tenancies, persons holding under oral tenancies cannot be deprived of the benefits of the Act merely on the basis of oral tenancies. It is significant to note that even after the introduction of section 4-B by the Amending Act of 1956, the definition of the term 'cultivating tenant' still continues to be the same and that definition, as already stated takes in oral tenancies as well. Unless that definition was amended so as to confine the operation of the Act only to tenancies under written agreement, the application of the Act to oral tenancies cannot be excluded. In this view of the matter, we are inclined to agree with the view taken by Mohan, J.

11. The Writ Appeal therefore fails and it is dismissed. There will be no order as to costs in this appeal.

B.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Matrimonial Jurisdiction)

Present:- *Sengottuvelan, J.*

*O.M.S.No.10 of 1984. *4th April,* 1985.

In the matter of the Indian Divorce Act IV of 1869.

S.Manuel Santharaj *Petitioner**

v.

Mrs. Jayarani and another *Respondents.*

Divorce Act (4 of 1869), section 16 - "Any person" - Meaning - Decree Nisi for divorce passed - Six months time granted for confirmation - Expiry of the period - Application made for confirmation - Notice to the opposite party whether necessary.

In this case a decree *nisi* for divorce was passed on 25.9.1984 providing for six months' time for its confirmation. The petitioner who is the husband filed an application stating that six months time had elapsed since the passing of the decree *nisi* and that the order of divorce will have to be confirmed. On the question whether notice to the respondent is necessary,

Held:- That no notice is necessary to make a decree *nisi* absolute. Accordingly since six months time had elapsed since the decree *nisi* had been passed, the decree *nisi* for divorce was made absolute.

Case referred to:-

Williams v. Williams, A.I.R.1936 Rangoon 499.

Suit praying that this court be pleased to pass a decree dissolving the marriage of the petitioner and the first respondent held on 1.2.1979 and awarding the costs of the suit.

The Court made the following

ORDER.- In this matter a decree *nisi* for divorce was passed on 25.9.1984 providing for six months time for confirmation. The petitioner who is the husband has filed an affidavit on 14.3.1985 stating that six months time had passed since the date of passing of decree *nisi* and as such the order of divorce will have to be confirmed.

2. On a doubt being felt as to whether notice in that application is necessary to the respondent, to clarify that doubt, the matter is posted today. Mr. G.M.Nathan, appearing for the petitioner contends that the procedure laid down under section 16 of the Indian Divorce Act relates to passing a decree for divorce in the first instance by giving six months time for confirmation so as to enable third parties to challenge the decree as one obtained by collusion between the parties and relies on the very section itself in support of his argument. Section 16 of the Indian Divorce Act reads as follows.

"*Section 16*:- Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof as the High court, by general or special order from time to time directs.

During that period any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of counsel and witnesses and otherwise arising from such cause being shown to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit."

Sub-section to section 16 only enables a third party to the proceeding to challenge the decree *nisi* on the ground of collusion. In the case reported in *Williams v. Williams*, A.I.R.1936 Rangoon 499 Justice Leach as he then was had an occasion to interpret the phrase "any person" appearing in the section in the following way:-

"The words "any person" in section 16 do not apply to the parties to proceedings, and consequently a respondent

has no right to show cause against the decree *nisi* being made absolute. Only officer appointed under section 17-A exercising jurisdiction exercisable by King's Proctor in England, or the third persons are entitled to intervene or show cause against the decree *nisi* being made absolute and even though allegations of misconduct subsequent to the granting of the decree *nisi* have been made by the respondent on his or her own responsibility the officer cannot leave the matter in the hands of the respondent."

I am in entire agreement with the learned Judge in the interpretation of the phrase "any person". Under the circumstances, no notice is necessary to make a decree *nisi* absolute. Accordingly six months time had passed since the decree *nisi* had been passed. The decree *nisi* for divorce is made absolute.

R.S. —— *Decree confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and K.Shanmugham, JJ.*

*W.A.No.111 of 1983 against W.P.No.4530 of 1979. *16th October, 1984.*

The Government of Tamil Nadu, represented by the Commissioner and Secretary to Government, Health and Family Welfare Department, Madras-9 and another

*Appellants**

v.

G.Kalyanam *Respondent.*

Constitution of India (1950), Article 226 - Tamil Nadu Pension Rules, Rule 9 - Scope and ambit.

In this case, charges were framed only after the respondent was retired and not before. The question is what would be the scope of the disciplinary enquiry which had been initiated against the respondent admittedly after his retirement. Rule 9 of the Tamil Nadu Pension Rules deals with the scope of such an enquiry. Under that rule, the Government reserve to themselves the right of withholding or withdrawing a pension or part thereof whether permanently or for a specified period and of ordering recovery from the person of the whole or past of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. That rule refers to a stage after the grant of pension to a Government servant. Withholding or withdrawing or recovery from pension will arise at a stage only when the pension has been sanctioned to a Government servant. Though rule 6 says that full pension is payable only when the service rendered by the Government servant has been duly approved by the pension sanctioning authority as satisfactory, once the pension has been sanctioned it cannot be reduced although proof of service not having been satisfactory may come to the notice of the pension-sanctioning authorities subsequent to the sanction of the pension as per rule 6(5). Therefore the departmental enquiry indicated after the Government servant retires cannot be for the purpose of determining the satisfactory nature of his service. A Government servant who has retired cannot be penalised if he is found guilty of grave misconduct during the period of service except to the extent covered by rule 9. Rule 8 of the Tamil Nadu Civil Services Classification, Control and Appeal Rules dealing with the various items of penalties will not apply after the Government servant has retired from service. Therefore any disciplinary enquiry conducted after a Government servant retires can only be for the purpose of working out the right of the Government to withhold, withdraw or to effect recovery from the pension. That would indicate that any disciplinary enquiry initiated after the retirement of a Government servant can

only be for the purpose of withholding, withdrawing or effecting recovery from pension towards any pecuniary loss caused to the Government by his grave misconduct or negligence. *[Para.7]*

Cases referred to:-

The State of Punjab v. Khemi Ram, (1971)1 S.C.J.263= (1970)2 S.C.R.657= A.I.R.1970 S.C.214; *R.P.Nair v. K.S.E.Board*, A.I.R.1979 Kerala 135.

Appeal under clause 15 of the Letters Patent against the order of Mr.Justice Padmanabhan, dated 16.10.81 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No. 4530 of 1979 presented under Article 226 of the Constitution of India to issue a writ of certiorarified Mandamus calling for the records comprised in the proceedings of the second respondent dated 26.2.79 in Ref.No.77213/ESI/SC/2/77, quash the said proceedings dated 26.2.79 and consequently forbearing the respondents from proceeding further against the petitioner pursuant to the impugned proceedings.

C.Chinnaswami, Additional Government Pleader, for Appellants.

D.Raju, for Respondent.

The Order of the Court was made by

Ramanujam, J.:- The scope and ambit of rule 9 of the Tamil Nadu Pension Rules has come up for consideration in this appeal.

2. The respondent herein retired as a Superintendent from the Tamil Nadu Medical Services on the afternoon of 31.3.1978. At the time of retirement he was working as Superintendent in the Employees State Insurance Hospital, Madras. Later, on 26.2.1979 he was served by the Director of Medical Services and Family Welfare with a memo containing the following two charges.

> "(1) That as a Superintendent being the head of the Institution he ought to have conducted 'on the spot enquiry' and submitted a report to the Director of Medical Services and Family Welfare about the circumstances leading to the death of patient Thiru Vasudevan who died in unusual circumstances. Thus he failed to do his legitimate duty.
>
> (2) That he had not cared to conduct an enquiry nor did he depute some one else holding administrative responsibility to conduct an enquiry immediately and send a report about the tragic death of a patient and thus he failed to discharge his duties entrusted to him as the head of the Institution."

By that memo he was asked to file a written statement of defence and to fill up the question which are required him to state as to whether he wants an oral enquiry or not. The respondent submitted his written representation on June 7, 1979 seeking an oral enquiry. Thereafter he was served with a notice dated 25.9.1979 informing him of the conduct of the enquiry on 17.10.1979 by the Director of Medical Services and Family Welfare. At that stage the petitioner filed Writ Petition No.4530 of 1979 questioning the jurisdiction of the Director of Medical Services and Family Welfare to initiate disciplinary proceedings, on the following grounds: (1) After his retirement on superannuation, the relationship of master and servant ceased, and (2) in any event the disciplinary proceedings initiated after retirement can only be for the purpose of making any recovery from him and not for any other purpose as will be seen from rule 9 of the Tamil Nadu Pension Rules.

3. In the counter affidavit filed by the appellants, the State Government and the Director of Medical Services and Family Welfare it was contended that so long as the respondent receives pension and other perquisites after his retirement from Government, the relationship of master and servant subsists, that in any event the proceedings having been initiated by the issue of a memo dated 30.1.1978 while the respondent was in service, the same could be continued even after his retirement and the appellants have jurisdiction to initiate proceedings even after the retirement for the lapses committed during his service. Thus the main

question that came up for consideration in the writ petition was as to whether disciplinary proceedings can be initiated or continued after retirement of a Government servant in view of rule 9 of the Pension Rules.

4. Padmanabhan, J. who heard the writ petition has taken the view that the enquiry contemplated under rule 9 of the Pension rules is only a limited type of enquiry in which if a retired Government servant is found guilty of grave misconduct or negligence during his period of service, the Government has the right of withholding or withdrawing a pension or part thereof ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government and as in this case as a result of the misconduct or negligence on the part of the respondent no recovery is sought on the ground of pecuniary loss to Government, rule 9 cannot be invoked. The correctness of the said view of Padmanabhan, J. has been questioned in this appeal.

5. According to the learned Government Pleader the appellants are entitled to initiate proceedings even after the retirement of the respondent in view of rule 9 of the Pension Rules. Mr.D.Raju, learned Counsel for the respondent, however, contends that even if the appellants are entitled to initiate proceedings even after the retirement of the respondent, the only punishment that the appellants can inflict on the respondent is to invoke the right conferred on the Government under rule 9 of the Pension Rules, that is, to recover the pecuniary loss arising out of the respondent's misconduct or negligence. Thus the controversy between the parties relates to the scope and ambit of rule 9 of the Pension Rules which is as follows:

> "9. *Right of Government to withhold or withdraw pension:-* (1) The Government reserve to themselves the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government, to local bodies and to Co-operative Societies comprising of Government servants and registered under the Tamil Nadu Co-operative Societies Act, 1961, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement.
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> 2(a). The departmental proceedings referred to in sub-rule (1) if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:
>
> . . . .
>
> (b) the departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment-
>
> (i) shall not be instituted save with the sanction of the Government
>
> (ii) shall not be in respect of any event which took place more than four years before such institution, and
>
> (iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.
>
> (3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose, or in respect of an event which took place, more

than four years before such institution.

(4) In case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental proceedings or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rules 65 or rule 74, as the case may be, shall be sanctioned.

(5) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule:

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant who has been placed under suspension from an earlier date, on such date and ..."

6. It is now well-settled that if disciplinary action is to be taken against an employee it must be taken before he retires from service, and if the disciplinary enquiry cannot be completed of one initiated already, the only course open to the Government is to pass an order of suspension and refuse to permit the concerned government servant to retire and permit him to continue in service till final orders are passed thereon. It is pertinent to note the following observations of the Supreme Court in *State of Punjab v. Khemi Ram*, (1970)2 S.C.R. 657= (1971)1 S.C.J.263= A.I.R.1970 S.C.214.

"There can be no doubt that if disciplinary action is sought to be taken against a Government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed thereon."

The principle of the above decision has been followed by a Full Bench of the Kerala High Court in *R.P.Nair v. K.S.E. Board*, A.I.R.1979 Ker.135.

7. In this case from the dates set out above it will be clear that the charges were framed only after the respondent was retired and not before. The fact that on 30.1.1978 an explanation was called for cannot be taken to be initiation of the disciplinary proceedings. It is only after retirement, disciplinary proceedings have been initiated against the respondent by framing charges. The question is what could be the scope of the disciplinary enquiry which has been initiated against the respondent admittedly after his retirement. Rule 9 of the Tamil Nadu Pension Rules deals with the scope of such an enquiry. Under that rule the Government reserve to themselves the right of withholding or withdrawing a pension or part thereof, whether permanently of for a specified period and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. That rule refers to a stage after the grant of pension to a Government servant. Withholding or withdrawing or recovery from pension will arise at a stage only when the pension has been sanctioned to a Government servant. Though rule 6 says that full pension is payable only when the service rendered by the Government servant has been duly approved by the pension-sanctioning authority as satisfactory. Once the pension has been sanctioned it cannot be reduced although proof of service not having been satisfactory may come to the notice of the pension-sanctioning authorities subsequent to the sanction of the pension as per rule 6(5). Therefore, the departmental enquiry initiated after the Government servant retires cannot be for the purpose of determining the satisfactory nature of his service. A Government servant who has retired cannot

be penalised if he is found guilty of grave misconduct or negligence during the period of service except to the extent covered by rule 9. Rule 8 of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules dealing with the various items of penalties will not apply after the government servant has retired from service. Therefore any disciplinary enquiry conducted after a Government servant retires can only be for the purpose of working out the right of the Government to withhold or withdraw or to effect recovery from the pension. That would indicate that any disciplinary enquiry initiated after the retirement of a government servant can only be for the purpose of withholding, withdrawing or effecting recovery from pension towards any pecuniary loss caused to the Government by his grave misconduct or negligence. Therefore the contention of the learned counsel for the respondent that any disciplinary enquiry that may be initiated after the retirement of a Government servant can only be for the purpose of recovery of the pecuniary loss caused to the Government and it cannot be for any other purpose and that the charges in a disciplinary enquiry initiated after the retirement of the Government servant can only relate to the pecuniary loss caused to the Government has to be accepted.

8. As a matter of fact a similar provision under Article 351-A of the Civil Service Regulations came up for consideration before Srinivasan, J. and the learned Judge observed:

> "The Explanation to this rule states that departmental proceedings shall be deemed to have been instituted when the charges framed against the petitioner are issued to him. Reading rule 10 of the Liberalised Pension Rules with Article 351-A of the Civil Service Regulations, it follows that the right to withhold or recover any portion of the gratuity can stem only from departmental proceedings in which the pensioner is found to have been guilty of negligence and to have caused pecuniary loss to Government by such negligence, and such departmental proceedings shall not be undertaken in respect of an incident which took place four years prior to the institution of those proceedings."

The learned Judge has proceeded on the basis that the enquiry that is contemplated under Article 351 must be with regard to such negligence or misconduct on the part of the Government servant which has resulted in a pecuniary loss to the Government. Rule 9 of the Tamil Nadu Pension Rules is in identical terms and therefore, rule 9 must also be restricted to such misconduct or negligence which has resulted in a pecuniary loss to the Government. The said principle has also been accepted by the Full Bench of the Kerala High court in *R.P.Nair v. K.S.E. Board*, A.I.R.1979 Kerala 135 where the learned Judges interpreting rule 3, Part III, and Chapter I of the Kerala Service Rules which is more or less identical with rule 9 of the Tamil Nadu Pension Rules had observed:

> "The rule does not authorise the continuance of disciplinary proceedings as such, against a Government servant after his retirement. Both on principle and on authority, such a position cannot be easily countenanced. It allows only a limited type of enquiry to be proceeded with namely an enquiry in regard to withholding or withdrawing pension, or of ordering recovery from pension by reason of any misconduct or negligence during the period in service of the employee. Under clause (a) of the proviso to the rule, the departmental proceeding, if instituted during the service of the employee is to be deemed to be a proceeding under the Rule and may be continued and completed even after his retirement. To this limited extent alone is provision made under the rule for continuance of a disciplinary enquiry beyond retirement. That too is, by transmitting it by fiction to be an enquiry under the Rule. Beyond this, we cannot understand the rule in any way permitting the authorities either to launch or to continue disciplinary proceedings after the retirement of the employee. That would be destruction of the concept of relationship of

employer and employee which has come to an end by reason of the retirement of the employee, beyond which, disciplinary control cannot extend."

In this case, the charges framed relate to the failure of the respondent to do his legitimate duty, and even if they are proved, they will not result in the recovery of any pecuniary loss caused to the Government. Even if the charges levelled against the respondent are established that will not lead to any recovery of pecuniary loss caused to the Government, from the pension granted to the respondent. We are, therefore, in entire agreement with the view expressed by Padmanabhan, J.

The writ appeal therefore fails and is dismissed. There will, however, be no order as to costs.

B.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswami and K.Shanmukham, JJ.*

*Writ Appeal No.178 of 1982.
20th November, 1984.

V.Veerarajan and others *Appellants**

v.

The Government of Tamil Nadu reptd. by the Secretary to Government, Labour and Employment, Dept. Madras-9 and others *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10(1) - Discretionary powers of Government to refuse to refer a dispute for adjudication - Not mitigated by inclusion of sections 2(A) and 11(A).

On the advent of section 2(A), Industrial Disputes Act where any employer discharged, dismissed, retrenched or otherwise terminated the service of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an 'industrial dispute'. In short if the circumstances under the said provision are established, the law shall presume that there shall be deemed to be an industrial dispute. It is pertinent to remember that any dispute or difference relating to discharge, dismissal, retrenchment or termination of the services of a workman otherwise, between that workman on the one hand and his employer on the other is nor an 'industrial dispute', as per section 2(k) of the Act. In other words, under section 2(k), a worker by himself is not enabled to raise an 'industrial dispute'. This handicap is removed by section 2(A). Section 2(A) has no further part to play. It would immediately follow that section 2(A) does not at all trench upon or control the discretion vested in the Government under section 10(1). *[Para.7]*

Under section 11(A) of the Act, the powers of Labour Courts, Tribunals and National Tribunals were alone enlarged. Before section 11(A), the powers of the Tribunals were very limited. But after the introduction of section 11(A), these tribunals are empowered to examine the evidence afresh and also to grant additional opportunities to both the parties to place further evidence to sustain or to assail an order passed by the Domestic Tribunal where the industrial dispute related to the discharge or dismissal of a worker. No doubt, when the Government refuses to make a reference, section 12(5) requires that it shall record and communicate the reasons therefor. In cases where section 11(A) is attracted, where the Government refuses a reference of the dispute for adjudication, the Government shall record its reasons also on the quantum of punishment. Before section 11(A), there was no statutory obligation on the part of the Government to give its reasons. When it refused a reference even in respect of

punishment awarded in a domestic enquiry. Now section 11(A), obliges, the Government to state reasons even on the quantum of punishment. This is the only effect of a conjoint reading of section 12(5) and section 11(A) of the Act. There is no nexus between the power conferred on the Government under section 10(1) and the enlarged power conferred on the Tribunals under section 11(A). Section 11(A) does not in any manner control the discretionary power of the Government under section 10(1). *[Para.8]*

According to the second proviso to section 10(1), where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. Thus, in a case where the dispute related to a public utility service, the Government had no discretion but is bound to make a reference under section 10(1). While in section 10(1) the word 'may' is used indicating that the discretion is vested with the Government either to refer or not to refer any dispute for adjudication, such a discretion is taken away in a case where the dispute related to a public utility service. Thus in the very same provision, two different powers in the Government are found. In such a case, it is but reasonable to conclude that the contrast was deliberately provided for; in other words the word 'may' in sub-section (1) cannot be read as shall. *[Para.9]*

Cases referred to:-

Delhi Cloth and General Mills Co., Ltd. v. Shambu Nath Mukherji, (1977) Lab.I.C.1695: (1977)4 S.C.C.415: (1978)1 S.C.R.591: A.I.R.1978 S.C.8; *Workmen v. Firestone Tyre and Rubber Co.*, (1973)1 S.C.C.813: (1973) Lab.I.C.851: (1973)3 S.C.R.587: A.I.R.1973 S.C.1227; *Arumugham v. Government of Tamil Nadu*, (1980)1 Lab.L.J.305; *Prem Kakkar v. The State of Haryana*, (1976)3 S.C.R. 1010: A.I.R.1976 S.C.1474; *P.Balasubramaniam v. Government of Tamil Nadu*, (1980) T.L.N.J.58; *Sengara Singh v. The State of Punjab*, (1984)1 Lab.L.J.161; *Hochtiee Gammon v. The State of Orissa*, (1975)2 S.C.C.649: (1976)1 S.C.R.667: (1975)2 Lab.L.J.418: A.I.R.1975 S.C.2226; *Nirmal Singh v. The State of Punjab*, (1984) Lab.I.C.1312: (1984)2 S.L.J.321: A.I.R. 1984 S.C.1619; *K.P.Lshatriya v. Khandelwal Udyog Ltd.*, (1981) Lab.I.C.1611: (1980)2 Lab.L.J.261; *Balasubramaniam v. Government of Tamil Nadu*, (1982)1 Lab.L.J.447; *Kamdar Singh v. State of Gujarat*, (1977)2 Lab.L.J.353; *Workmen J & P Coats v. State of Kerala*, (1977)2 Lab.L.J.534; *Venkatiah v. Government of India, Ministry of Labour*, (1978)2 Lab.L.J.487: (1978) Lab.I.C.1359.

Appeal under clause 15 of the Letters Patent against the Order of Mr.Justice Nainar Sundaram dataed 21.1.1982 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.350 of 1982 presented under Article 226 of the Constitution of India, to issue a writ of mandamus directing the 1st respondent by the Secretary to Government, Labour and Employment Department, Fort St. George, Madras-9 to reconsider their Order dated 11.10.1979 and made in G.O.Ms.No.1650, Labour and Employment Department (Exhibit A) as confirmed by their Order dt. 1.6.1981 in No.14148/R2/81-3 (Exhibit B) in accordance with law.

N.G.R.Prasad of M/s. Row and Reddy, for Appellants.

M.A.Sadanand and Mrs.Jayanthi Natarajan, for 1st Respondent.

A.R.Ramanathan, 3rd Respondent.

The Judgment of the Bench was delivered by

K.Shanmukham, J.:- The appellants are seven workmen whose services were terminated by the 3rd respondent, the Management of Lucas TVS Limited. In respect of such a dispute between the appellants on the one hand and the 3rd respondent on the other as regards the non-employment of the appellants, conciliation

proceeding was held by the Labour Officer, Chingleput, and the said Officer submitted his failure report on 19.7.1979. However, the 1st respondent declined to refer the said dispute for adjudication, vide G.O.Ms. No.1650 dt. 11.10.1979. Aggrieved against such refusal by the Government to refer the "industrial dispute for adjudication", the appellants came forward with W.P.No.350 of 1982 for the issue of a proper writ, order or direction, as the case may be, in particular, for the issue of a writ in the nature of mandamus directing the 1st respondent (Government of Tamil Nadu) to reconsider their order dt. 11.10.1979 (referred to supra) and as confirmed by the further order dt. 1.6.1981. The said matter came up for admission before Mr.Justice Nainar Sundaram. But the learned Judge dismissed the writ petition *in limine*. Hence this appeal.

2. Before we refer to the contentions put forward on behalf of the workmen, it is essential to notice the grounds urged by them before the learned Judge. They can be gathered from the order appealed against. The first ground is that section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") lacks guidelines with reference to the exercise of the powers conferred on the appropriate government. The second ground is that when the order is passed under section 10(1) of the Act which involves grave consequences, the appellants ought to have been heard by the Government before the order is made in conformity with the principles of natural justice and as such procedure was not adhered to, the order should be held to be illegal and has to be set aside. The last ground is that the third respondent had acted discriminatorily against the appellants alone because when other workers who were also proceeded against by the Management in the departmental enquiry and were found guilty were reinstated the appellants alone were singled out and their services were terminated and that this vital aspect does not appear to have been noticed and considered by the Government.

3. Before us, additional points were also urged. The foremost point is that after the inclusion of section 2(A) and section 11(A) in the Act, there is no discretion vested in the government but to refer the industrial dispute for adjudication. In other words, according to the learned counsel for the appellants, the word 'may' in section 10(1) of the Act has to be read as 'shall' in a case where the services of the workmen are terminated or retrenched or discharged. The learned counsel further pointed out the purpose of widening the jurisdiction of the Tribunal under section 11(A) is a clear pointer to the fact that the government has no discretion but to refer the matter for adjudication. His further contention is that though there was no amendment as such to section 10, yet the existence of these two provisions, namely, section 2(A) and section 11(A) which are intended to protect the interest of the workmen had really usurped the discretion that was vested with the government under section 10. The learned counsel further pointed out that the question whether the punishment of termination is disproportionate to the charges is not within the jurisdiction of the government but is within the exclusive domain of the Tribunal and that this will also suggest that in a case of termination governed by sections 2(A) and 11(A), the government 'shall' refer the dispute for adjudication.

4. On merits, the learned counsel pointed out that the government, in any event, had not considered the complete discrimination made by the Management between those who were reappointed and the appellants who were dismissed from service. Non-consideration of such vital matters will invalidate the impugned order. His further argumet is that all the conditions for reference are fully established in the instant case and consequently the government was bound to refer the dispute for adjudication. Relying upon the report of the Commissioner of Labour dated 30.8.1979, the contention is that the government is bound by the report of the Commissioner of Labour and as the Commissioner of Labour had suggested the reference of dispute to adjudication, the government cannot ignore the report of the Commissioner of Labour and refuse a reference. He further pointed out in this connection that the government had

not given any reason, more so, weighty reasons, to differ from the Commissioner of Labour.

5. The appeal is resisted not only by the Management represented by Mr.A.R. Ramanathan but also by Mr.Sadanand, learned Government advocate. It may be useful to point out that the Management as also the Government filed respective counter to the writ petition in this appeal for, as earlier pointed out, the writ petition was dismissed *in limine*. It may also be noticed immediately that the charge of discrimination urged by the appellants, according to the learned counsel for the third respondent-management, was not raised before the learned judge and, therefore, the appellants should not be permitted to urge the said charge. On the strength of the averment set out in the counter filed by the Management, the learned counsel submitted that they disputed the facts on which the charge of discrimination is founded. We will be referring to it at the appropriate time in detail on this subject. Learned Government advocate brought to our notice sections 33(A) and 33(C)(2) in the Act to support his contention that section 10 stands unaffected notwithstanding the introduction of sections 2(A) and 11(A) of the Act. The learned counsel emphasised relying upon A.I.R.1965 Supreme Court 661 at 680 that a legal fiction created under a statute in confined to the purpose for which it is intended and the same shall not be extended for any other purpose. He further submitted that though the Parliament amended the Act in 1965, 1971 and 1982, section 10 did not suffer any amendment notwithstanding the introduction of sections 2(A) and 11(A) of the Act.

6. At the outset, we have to point out that the learned counsel for the appellants had not argued the point that section 10 is unconstitutional for want of guidelines with reference to the exercise of the powers conferred on the appropriate government. Be that as it may, it is too late in the day for the appellants to assail the vires of section 10 of the Act in view of the decision of the Supreme Court in *Delhi Cloth and General Mills Co. Ltd. v. Shambunath Mukherji and others*, (1977) Lab.I.C.1695= (1977)4 S.C.C.415= (1978)1 S.C.R.591= A.I.R.1978 S.C.8 which was also relied on by the learned judge. Thus this point fails.

7. Let us now consider as to whether section 2(A) and section 11(A) had mitigated the discretionary powers of the government under section 10(1) of the Act to refuse to refer the dispute for adjudication. Section 2(A) provides.

> "2A. Where any employer discharges, dismisses, retrenches or otherwise terminates the service of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workman is a party to the dispute."

Section 11-A provides -

> "11-A. Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal, or National, Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:
>
> Provided that in any proceeding under this section, the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter".

It may be noticed that section 2(A) was inserted by Act 35 of 1965 with effect

from 1.12.1965 while the other provision, namely, section 11(A) was inserted by Act 45 of 1971 and came into force with effect from 15.12.1971. Under section 10(1), where the appropriate government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, refer the dispute to a Board for promoting a settlement thereof or refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry or refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to the matter specified in the second schedule, to a Labour court for adjudication, or refer the dispute or any matter appearing to be connected with, or relevant to the dispute, whether it relates, to any matter specified in the second schedule or the thrid schedule, to a tribunal for adjudication. The second proviso alone may be noticed at this stage. According to that proviso, where a dispute relates to a public utility service and a notice under section 22 has been given, the appropriate government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceeding under this Act in respect of the dispute may have commenced. (emphasis supplied by us). Under section 12(5), if, on a consideration of the report referred to in sub-section (4), the appropriate government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference, and, where the appropriate government does not make a reference, it shall record and communicate to the parties concerned its reasons therefor. On the advent of section 2(A), where any employer discharged, dismissed, retrenched or otherwise terminated, the service of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. In short, if the circumstances under the said provision are established, the law shall presume that there shall be deemed to be an industrial dispute. If we turn to section 10(1) it is clear that before a reference is made by the government, it shall form the opinion that an industrial dispute exists or is apprehended. It is pertinent to remember that any dispute or difference relating to discharge, dismissal, retrenchment or termination of the services of a workman otherwise, between that workman on the one hand and his employer on the other is not an 'industrial dispute' as per section 2(k) of the Act. In other words, under section 2(k) a worker by himself is not enabled to raise an 'industrial dispute.' This handicap is removed by section 2-A. Section 2(A) has no further part to play. It would immediately follow that section 2-A does not at all retrench upon the discretion vested in the government under section 10. A close reading of these two provisions sections 2-A and 10 of the Act will justify our view.

8. Now turning to section 11(A) of the Act, we must point out that under that provision, the powers of Labour Courts, Tribunals and National Tribunals were alone enlarged. It may be useful to point out at this juncture that before section 11(A) the powers of these Tribunals in the reappraisal of the evidence before tha Domestic Tribunal were very limited. But after the introduction of section 11(A) these Tribunals are empowered to examine the evidence afresh and also to grant additional opportunities to both the parties to place further evidence to sustain or to assail an order passed by the Domestic Tribunal where the industrial dispute related to the discharge or dismissal of a worker. Though the side-note is not conclusive, yet, it is relevant to understand the content of a particular provision. In this case, section 11(A) prescribes powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen. Even a fair reading of the said provision indisputably points out where an industrial dispute relating to the discharge or dismissal of a workman had been referred to such Tribunal, such enlarged powers as prescribed under section 11(A) can be used

by such Tribunals. To put it differently, the discretion vested in the government under section 10(1) is in no way ruffled by this provision. No doubt, when the government refuses to make a reference, section 12(5) requires that it shall record and communicate the reasons therefor. In case where section 11(A) is attracted, where the government refuses a reference of the dispute for adjudication, the government shall record its reasons also on the quantum of punishment. Before section 11(A), there was no statutory obligation on the part of the government to give its reason when it refused reference even in respect of punishment awarded in a domestic enquiry. Now, section 11(A) obliges the government to state reasons even on the quantum of punishment. This, in our view, is the only effect of a conjoint reading of section 12(5) and section 11(A) of the Act. We have to reiterate that section 11(A) had no effect at all on section 10. We find no nexus between the power conferred on the government under section 10(1) and the enlarged power conferred on the Tribunals under section 11-A. If so, there can be no justification whatever to dilute the discretionary power of the government under section 10(1) simply because a radical change is made in the power of the Tribunals in that their jurisdiction over the findings of the domestic tribunal was enlarged. The object of section 11-A is to confer on Tribunals larger powers so as to enable them to interfere with the punishment of termination if it were found that the punishment is disproportionate to the charge. As otherwise, if for a trivial charge the workman is dismissed and if the finding of guilt could not be interfered with by the Tribunals, the workman would be left helpless and would be without any remedy. Section 11-A rescues the workman from such disproportionate punishment at the hands of the establishment. Further, it is manifest from the wording employed in section 11-A that only on a reference are the Tribunals enabled to exercise such wide power now conferred on them under section 11-A. We hold that section 11-A does not in any manner control the discretionary power of the government under section 10(1).

9. These apart, there are intrinsic indications in the Act itself, which positively point out that the discretion of the government is in no way fettered by sections 2-A and 11-A. In the foremost, the second proviso to section 10(1) which came into force with effect from 10.3.1957, requires to be noticed. According to that proviso, where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. Thus, in a case where a dispute related to a public utility service, the government had no discretion but is bound to make a reference under section 10(1). While in section 10(1) the word 'may' is used indicating that the discretion is vested with the government either to refer or not to refer any dispute for adjudication; such a discretion is taken away in a case where the dispute related to a public utility service. Thus, in the very same provision two different powers in the government are found. In such a case, it is but reasonable to conclude that the contrast was deliberately provided for; in other words the word 'may' in sub-section (1) cannot be read as 'shall'. This contrast conclusively establishes that except in a case covered by the proviso referred to above, it is for the government to exercise its direction in all other cases either to refer or to refuse a reference for adjudication. Obviously, therefore, the learned counsel for the appellants confined his argument on the interpretation of section 10(1) to the effect that in a case where sections 2-A and 11-A are attracted, the government has no discretion but shall refer the dispute for adjudication. Besides, if we turn to sections 33-A and 33-C(2), it is seen that a right is conferred on any employee to approach directly any of the Tribunals named therein to obtain the reliefs referred to in the said provisions. Under section 33-A where an employer contravenes the provisions of section 33 during pendency of the proceedings

before a Labour Court, Tribunal or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing in the prescribed manner to such Labour Court, Tribunal or National Tribunal and on receipt of such complaint, that Labour Court, Tribunal or National Tribunal, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate government and the provisions of this Act shall apply accordingly. Section 33(2) enables a workman to have the question arising as to who is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and to have any question arising as to the amount of money due or as to the amount at which such benefit should be computed, decided by such Labour Court as may be specified in this behalf by the appropriate government. Therefore, if really the Parliament intended that in the face of sections 2-A and 11-A, the goverment's discretion under section 10(1) were to be curtailed, it would have added a proviso to section 10(1) as the second proviso, referred to supra. But that is not the case. The significance of non-amendment to section 10 by the Parliament is a major and important factor to appreciate the impact of sections 2-A and 11-A on section 10. If the Parliament in its wisdom did not amend section 10 notwithstanding sections 2-A and 11-A, it stands to reason that it deliberately avoided defusing the discretionary powers of the government to refer or not to refer any industrial dispute for adjudication. We are, therefore, unable to accept the interpretation, as suggested by the learned counsel for the appellants that in a case covered by sections 2-A and 11-A the government had no other alternative but to refer the dispute for adjudication. Indeed, the Supreme Court in *Workmen v. Firestone Tyre and Rubber Co.*, (1973) 1 S.C.C.813= (1973) Lab.I.C.851= A.I.R.1973 S.C.1227= (1973)3 S.C.R.587 at page 608 observed:

> "To invoke section 11-A, it is necessary that an industrial dispute of the type mentioned therein should have been referred to an Industrial Tribunal for adjudication.

10. It is equally of vital importance to notice that in the cases rendered after the advent of sections 2-A and 11-A and cited before us by both the learned counsel, no decision had gone to the extent of laying down the law that on account of sections 2-A and 11-A the discretion of the government under section 10 was lost or taken away, save *S.Arumugham v. Govt. of Tamil Nadu*, (1980)1 I.L.J.305 which would actively support our view.

11. In *Prem Kakkar v. Haryana*, (1976)3 S.C.R.1010= (1976)3 S.C.C.433= A.I.R.1976 S.C.1474, the principle laid down is that in entertaining an application for a writ of mandamus against an order made by the appropriate government under section 10(1) read with section 12(5) of the Act the court does not sit in appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons and that if it appears from the reasons given that the appropriate government took into account any consideration irrelevant or foreign, then the court may in a given case consider the case for a writ of mandamus. In that case, ultimately the Supreme Court held it was not a fit case for reference for adjudication and upheld the government's refusal to refer the dispute for adjudication.

12. Varadarajan, J. (as he then was) in *S.Arumugham v. Government of Tamil Nadu*, (1980)1 L.L.J.305 held that because the government took into account the report of the Advisory Committee, which included among its Members the Managing Director of the Management itself and because the Goverment's order did not contain anything to show that the government went into the truth or otherwise of the fact mentioned by the conciliation officer in paragraph 5 of his failure report that the action of the management is not free from suspicion in regard to their motive having regard to the fact that the petitioner was an active office-bearer, namely General Secretary of the TIDCO Employees' Union, quashed the order of the government refusing a reference and directed the government to reconsider

the matter in the light of relevant materials and his judgment. At the same time, at page 308 second column, the learned Judge observed:

"There is no doubt that the government has completely ignored the effect of section 11-A of the Industrial Disputes Act in case a reference is made under section 10(1) read with section 12(5) of the Act though section 11-A cannot be stated to compel a reference in all cases."

It is this passage which would repel the contention of the learned counsel for the appellants. It is convenient to advert to the argument advanced by the learned counsel for the appellants relying on the observations of the learned judge and that is:

"What is more, the government had declined to make a reference inspite of the fact that the motive of the second respondent has been suspected by the conciliation officer and both the conciliation officer and the Commissioner of Labour have reiterated that the matter may be subjected to judicial scrutiny by making a reference for adjudication before the Labour Court."

A reading of the judgment, as a whole, would clearly point out that the learned judge did not quash the order of the government solely on the ground that the goverment failed to accept the recommendation of the Commissioner of Labour. As a matter of fact, the argument advanced by the learned counsel for the appellants is that the government is bound by the report of the Commissioner of Labour considering the position the said Officer holds in that particular Department and if the government were to differ it shall give weighty reasons for the same. Such a contention is hardly tenable and the judgment of the learned judge, quoted above, does not lend support to such a contention. It is relevant to notice that in that case both the conciliation officer and the commissioner of labour reiterated that the dispute should be referred to adjudication and further, as already pointed out by us, that was not the only circumstances which persuaded the learned judge to quash the said order of the government. On the other hand, the more powerful circumstances which really influenced the learned judge are that the government considered the report of the Advisory Committee in which the Managing Director of the Management itself was a member and that the government's order did not contain anything to show that the government went into the truth or otherwise of the fact mentioned by the conciliation officer in paragraph 5 of his failure report that the action of the second respondent is not free from suspicion in regard to their motive having regard to the fact that the petitioner was an active office-bearer in the Union concerned.

13. A Division Bench of this court in *P.Balasubramaniam v. Government of Tamil Nadu reptd. by the Secretary Labour and Employment Department Madras and another*, (1980) T.L.N.J.58 had pointed out.

"The fact that the government did not state in the order declining to make a reference that they were satisfied that the punishment was not disproportionate cannot preclude the government from stating to the court, when the issue was before the court that they had considered the question and were of the opinion that the punishment was not disproportionate."

For that purpose, the Division Bench relied on paragraph 3 of the counter affidavit filed by the government, in which the government clearly stated that having regard to the nature of the misconduct, the punishment could not be held to be disproportionate. It is also interesting to note that the Bench had further observed.

"But simply because the government stated that the application of section 11-A of the Act would arise only after a reference had been made to the Labour Court or the Tribunal it could not be held that the government had not considered whether the punishment was disproportionate or not, before they declined to make the reference."

Thus, ultimately it upheld the order of the learned Single Judge of this court, who in turn declined to set aside the order of the Government refusing to make a reference. The Division Bench further found that the government had considered all the facts before it declined to make a reference.

14. In *Workmen v. Firestone Tyre and Rubber Co.*, (1973)1 S.C.C.813= (1973)3 S.C.R.587= A.I.R.1973 S.C.1227= (1973)1 L.L.J.278 the effect of section 11-A was noticed by the Supreme Court and we quote the relevant paragraph:

> "The legislature in section 11-A has made a departure in certain respects in the law as laid down by this court. For the first time, power has been given to a Tribunal to satisfy itself whether misconduct is proved. This is particularly so, as already pointed out by us, regarding even findings arrived at by an employer in all enquiry properly held. The Tribunal has also been given power, also for the first time, to interfere with the punishment imposed by an employer. When such wide powers have been now conferred on Tribunals, the legislature obviously felt that some restrictions have to be imposed regarding what matters could be taken into account. Such restrictions are found in the proviso. The proviso only emphasises that the Tribunal has to satisfy itself one way or other regarding misconduct, the punishment and the relief to be granted to workman only on the basis of the 'materials on record' before it. What those materials comprise of have been mentioned earlier. The Tribunal, for the purposes referred to above, cannot call for further or fresh evidence, as an appellate authority may normally do under a particular statute, when considering the correctness or otherwise of an order passed by a subordinate body. The 'matter' in the proviso refers to the order of discharge or dismissal that is being considered by the Tribunal."

Though, we would be referring to *Sengara Singh v. State of Punjab*, (1984)1 L.L.J.161 in detail in due course, we have to point out at this stage that the effect of sections 2-A and 11-A did not fall for consideration in that case. What was pointed out by the Supreme Court in *Hochtiee Gammon v. State of Orissa*, (1976) 1 S.C.R.667= (1975)2 L.L.J.418= (1975)2 S.C.C.649= A.I.R.1975 S.C.2226 is that the courts can interfere with such executive orders passed by the Government, if the government refused to consider relevant matters or took into account wholly irrelevant and extraneous considerations or they misdirected themselves on a point of law and in short the court has the power to see that the executive acts lawfully. It was further pointed out that the government should give reasons and that if they are not good reasons, the court can direct them to reconsider the matter in the light of relevant matters though the propriety, adequacy or satisfactory character of these reasons may not be open to judicial scrutiny. In that case, no doubt the order of the government was quashed and the State Government of Orissa was directed to reconsider the matter and take a decision in the matter of reference in the light of the relevant facts.

15. Where the Labour Commissioner, while exercising the powers of the State Government under section 12 for making reference, declined to refer the dispute for adjudication on the ground that the delinquent, a bank employee, was not a "workman" within the meaning of section 2(s) but no reasons were given by him to justify that conclusion, all that he has stated in his order was that the post held by the delinquent did not fall within the category of workman, "the Supreme Court straightaway directed the Labour Commissioner to make a reference either to the Labour Court or to the Industrial Tribunal under section 12(5) as he considers proper - vide *Nirmal Singh v. State of Punjab*, (1984) Lab.I.C.1312= (1984)2 S.L.J.321= A.I.R.1984 S.C.1619.

16. A Division Bench of the Bombay High Court in *K.P.Kshatriya v. Khandelwal Udyog Ltd.*, (1980)2 L.L.J.261= (1981) Lab.I.C.1611 made the following observations:

"The power conferred under section

10 to make a reference or not, is indeed discretionary and that the government is not bound to make a reference of any dispute because a party or a union or the employer demands such a reference. Even so, the government is under an obligation to exercise the discretion, reasonably and by reference only to relevant considerations. One of the relevant considerations, while making or refusing to make a reference, after the introduction of section 11-A must necessarily be that the employee is entitled to get the evidence as to the proof of his misconduct received in such a reference as also the quantum of punishment, even if the misconduct is held to have been proved. In other words, the circumstances that the disciplinary authority or the appellate authority over the same has applied its mind to the evidence on record and had *bona fide* come to some conclusion as to the proof of misconduct and the quantum of punishment by itself is not sufficient to refuse to make reference.

In the altered legal situation, the government has to consider *prima facie* whether there is anything in the evidence which may goad or persuade the Labour Court or the Industrial Tribunal to change its opinion as to the conclusion of misconduct or the quantum of punishment therefor. The government may refuse to make a reference if in their *prima facie* opinion the right of getting evidence reviewed already recorded and the right of getting reviewed the quantum of punishment awarded, is bound to be of no practical use in a particular case."

In conclusion, the Division Bench quashed the order of the government, because, according to them, the government has not borne in mind the relevant considerations. It is pertinent to notice that the learned judges of the Bombay High Court expressed, no doubt, about discretionary power vested with the government under section 10 notwithstanding section 11-A, on the other hand, they asserted that the power conferred under section 10 to make a reference or not is indeed discretionary and then the government is not bound to make a reference of any dispute.

17. Padmanabhan, J. in *Balasubramaniam v. Government of Tamil Nadu*, (1982)1 L.L.J.447 pointed out that the petitioner therein never questioned the severity of the punishment in any of his representations and held.

"As the government had applied its mind to the consideration of severity of the punishment, the question whether "victimisation" would include a case where a worker has been punished out of proportion to the offence need not be decided."

18. Even the decision in *Kamdar Singh v. State of Gujarat*, (1977)2 L.L.J.353; *Workmen J and P Coats v. State of Kerala*, (1977)2 L.L.J.534 and *Venkatiah v. Government of India, Ministry of Labour*, (1978)2 L.L.J.487= (1978) Lab.I.C.135 had uniformly laid down that the government shall take into consideration all relevant considerations and should not be influenced by remarks which are not germane.

19. We do not find any substance in the contention urged by the learned counsel for the appellants that the courts shall give due importance to the policy of the Act. According to the learned counsel, being a benevolent statute, the courts shall render an interpretation as to advance the interest of the workmen. But the Act is intended to make provision for the investigation and settlement of industrial disputes and for certain other purposes. Even since the introduction of the Act, the discretion to refer or not any industrial dispute for adjudication came to reside only with the government. As already pointed out, notwithstanding several amendments in 1965, 1971 and 1982 the discretion of the government under section 10(1) never underwent any change. As a matter of fact, learned counsel for the appellants did not dispute the discretionary power vested with the government under section 10(1) before the advent of sections 2-A and 11-A. If so, we are unable to understand as to how the policy of the Act would have an impact in any way on section 10(1) merely because sections

2-A and 11-A were introduced later. In other words, section 10(1) was in consonance with the policy of the Act before the introduction of sections 2-A and 11-A. Then, it is too late in day to contend that by virtue of the two provisions having been inserted in the act, section 10 would be repugnant to the policy of the Act. The correct approach should be to find out how far these two new provisions had affected the discretionary right of the government under section 10(1). We have already expressed our opinion.

20. Learned counsel for the appellants also stressed that if the government were to refuse a reference as in this case, it would be frustrating the workmen's right to have the dispute adjudicated by a National Tribunal. This argument does not appear to us to be sound. For, the judicial pronouncements have indicated that the court has the power to interfere with the orders of the government in refusing a reference for adjudication in certain circumstances. Nor does the purpose of section 11 become illusory, as repeatedly urged by the learned counsel for the appellants, simply because in certain cases involving termination of service of the employee, the government refused a reference. For, wherever the matter is referred to arbitration, the Tribunal shall exercise the wide powers conferred under section 11-A. Where there is a wrongful refusal, the wrongful refusal can be remedied by this court under Article 226 of the Constitution of India, as indicated by the judicial pronouncements, referred to supra. Thus, even this argument has to be rejected.

21. We may incidentally point out that in view of the decision in *Nirmal Singh v. State of Punjab*, (1984) Lab.I.C.1312= (1984)2 S.L.J.321= A.I.R.1984 S.C.1619, we have no hesitation to hold that this court has the power under Article 226 to issue a writ of mandamus straightway directing the government to refer the dispute for adjudication.

22. On merits, the argument of the learned counsel for the appellants is that the government had not taken into consideration all the relevant circumstances. According to him, the most relevant and important circumstance is that the Management had made a discrimination between the workers who were taken back into service vis-a-vis the appellants and five others, who were dismissed from service. Learned counsel would urge that the conduct of the management in reappointing 135 alone and in dismissing the rest, including the appellants, herein, is plagued with discrimination; that this particular aspect was not noticed by the government, as is evident from the impugned order, that therefore, the government failed to consider the material consideration and that consequently the order is liable to be quashed. The point of law involved in this submission is beyond doubt. But the question is whether the appellants have succeeded in placing relevant factual data to sustain such a contention. We may straightway point out that in paragraph 14 of the counter affidavit filed by the management (third respondent) it is denied that the charge sheets containing the same charges were issued to 154 employees with an ulterior motive. It is further pointed out in that paragraph that there is no question of discrimination alleged by the petitioners, because the Enquiry Officers were different, charges were different in each case and these enquiries were independent and separate fully participated by the petitioners with the assistance of their leader and co-worker Sri K.Ramamoorthy. It is further pointed out in paragraph 15 of the counter affidavit that the punishment was awarded on a careful consideration of the charges, the proceedings of the enquiry, the findings of the enquiry proceedings and the past record of service. The appellants did not choose to file a reply affidavit. It is equally relevant to notice that neither in the letter dt. 27.2.1979 addressed to the Management nor in the revision dt. 17.4.1979 to the Commissioner of Labour and Welfare Department, had the appellants pleaded necessary facts to found a case of discrimination. The explanation put forward by the learned counsel for the appellant is that after all the workmen are not competent draftsmen and, therefore, liberal approach has to be made by this court. But unfortunately for the appellants even

in the affidavit filed in support of the writ petition necessary facts are not averred to found the grievance of discrimination. The only reference in the affidavit filed by the appellants in support of the writ petition is to the effect that the third respondent management reinstated all the charge-sheeted employees except 12 including the seven present writ petitioners, that the action of the third respondent management dismissing the petitioners while reinstating other similarly charge-sheeted employees against whom also charges were held to be proved was discriminatory, arbitrary and vindictive. It is needless to state that unless it is not only pleaded but also established by satisfactory evidence that all the 154 employees wer charge-sheeted for identical char s, and for the charges so proved the establishment reinstated a major number of workmen but dismissed the twelve workmen including the writ petitioners, the appellants are not entitled to complain of discrimination or arbitrariness as against the management. As already pointed out, the affidavit filed in support of the writ petition is bereft of material particulars. Nor had the appellants chosen to file a reply affidavit before us when in the counter affidavit the Management had denied any such discrimination. It is relevant to note that while the management awarded punishment it not only took 'ie guilt that was established in the domestic enquiry, but also the antecedents of several workmen. If, therefore, the Management took into consideration not only the guilt that was admitted by them in the domestic enquiry, but also their respective antecedents there can be no room for the contention that there was any differential treatment of those who were reappointed and those who were dismissed from service. Indeed, we had occasion to refer to the counter filed by the management that the management took into consideration not only the guilt but also the past record of service. It may not be out of place to refer to the failure report filed by the Labour Officer, Chingleput District to the government. As regards, A.Kondiah, it is stated therein that even on 23.8.1977 he failed to do his work, but also went to the other departments and prevented other workmen from doing their work. Thus, his past blemished record of service also prevailed with the management when they passed the orders of dismissal. A similar reference is found in that report regarding Harinathan and Kabaleeswaran. These circumstances will certainly fortify the stand taken by the management in the counter affidavit that not only the guilt but also the past record of services were taken into account by the management when they passed the orders. If the appellants had blemished records in the past and if such antecedents were also taken into account by the management in awarding the punishment of dismissal, it is not possible to accept the appellants' contention that there was a discrimination amongst equals. We have to reiterate that the workmen had not laid foundation to support such a charge by alleging all relevant factors, such as antecedents of every workman, charges levelled against every workman and failed to satisfy by means of evidence that not only the past antecedents, but also the charges were identical between the workmen who were reappointed and the workmen who were dismissed from service. We reiterate no such materials were placed before the court, nor were they alleged in the affidavit filed in support of the writ petition. If so, the appellants have not made the necessary pleadings nor have they made out a case for sustaining their grievance of discrimination.

23. It is worthwhile to notice that even in the decision rendered by the Supreme Court in *Sengara Singh v. State of Punjab*, (1984)1 L.L.J.161 it is clear that if the present petitioners were to be guilty of more serious misconduct or the degree of indiscipline in their case was higher than compared to those who were reinstated, there can be no discrimination as is evident from the following observations:

> "Now if the indiscipline of a large number of personnel amongst dismissed personnel could be condoned or overlooked and after withdrawing the criminal case against them, they could be reinstated, we see no justification in treating the present appellants differently without pointing out how they were guilty of more serious misconduct or

the degree of indiscipline in their case was higher than compared to those who were reinstated. Respondents failed to explain to the court the distinguishing features and, therefore, we are satisfied in putting all of them in same bracket. On that conclusion the treatment meted to the present appellants suffers from the vice of arbitrariness and Article 14 forbids any arbitrary action which could tantamount to denial of equality as guaranteed by Article 14 of the Constitution."

In this case, we had already referred to the fact that no materials were placed before us to sustain the contention that all the employees were charged on identical accusation and that on the other hand it is fairly established by the management (third respondent) that the charges were quite different. There were as many individual enquiries as there were workmen and that while imposing the punishment not only the guilt that was admittedly by the employees but also the antecedents of every workman were taken into consideration. Thus, these are the distinguishing features which would forbid the application of the ratio laid down in the above Supreme Court decision.

24. However, it may be still open to the appellants to contend that the government had failed to consider this important point. Here again, we have to point out that the appellants cannot succeed for the simple reason that in their representations to the government this was not at all pleaded. It is relevant to refer at this stage to the letter of Mr.V.P.Chinthan, dt. 26.7.1979 addressed to the Secretary, Labour Department, Government of Tamil Nadu, Madras and the letter dt. 26.7.1979 addressed by the President of the Lucas-TVS employees Union to the Minister for Labour. These we could find from the government files produced by the learned Government advocate. On that basis, the impugned order came to be passed on 11.10.1979, where by the government refused a reference of adjudication. Thereafter, it appears that further representations were being made by the appellants to the government. One such representation is dt. 20.2.1981. It is this document that is pressed into service by the learned counsel for the appellants to support his contention that the workmen had brought to the notice of the government about the discriminatory treatment meted out to the appellants. Particular emphasis is made on paragraph 5 at page 95 of the government files. Even the allegation in that paragraph 5 would not in any way assist the appellants. It might be that in that paragraph it is stated that for like charges 154 employees were proceeded against and after enquiry while 135 were reappointed, 19 alone were dismissed, and such a conduct on the part of the management is discriminatory. We must point out that assuming the charges are identical that alone will not enable the appellants to successfully contend that the management is guilty of discrimination. For, we have already pointed out that when the management passed the punishment they took into account not only the guilt in the domestic enquiry, but also the past record of every workman. There is no reference in this document to the consideration of past record. Then, it is very difficult to accept the argument relating to discrimination.

25. We may incidentally add that though it was vehemently opposed by Mr.A.R. Ramanathan, learned counsel for the management that this new point should not be permitted to be raised by the appellants, we proceeded to consider them in the larger interest of the dismissed employees, particularly when there is a feeling of frustration in the minds of the dismissed employees.

26. The only other question is, whether the government has given reasons for its refusal to refer the dispute for adjudication. In this connection, the order itself is required to be noticed. The order runs thus:

LABOUR AND EMPLOYMENT DEPARTMENT

G.O.Ms.No.1650 Dated 11.10.1979.

Read the following

1. From the Labour Officer, Chingleput

at Madras conciliation report No.1055/79 dt. 19.7.79;

2. From the Commissioner of Labour, letter No.83/65286/79 dt. 31.7.79.

ORDER: The Government have examined the conciliation report of the Labour Officer first cited in regard to an industrial dispute raised by Thiru A.Kondiah and 6 others against the Management of Lucas TVS Limited, Madras-50 over the issue relating to the non-employment and they pass the following orders:-

2. It is seen that the enquiries were conducted adhering to the principles of natural justice and that the punishment imposed is not disproportionate to the gravity of the offence committed.

3. Hence the government consider that there is no case to refer the issue in dispute for adjudication."

We find that the order had given reasons even with regard to the question whether the punishment imposed is disproportionate or not to the gravity of the offence committed. Thus, we find there is enough compliance of section 12(5) of the Act. It is needless to state, as also pointed out by the learned Judge, whose order is appealed against, that there is no mandate in law that the government shall write a judgment as such summarising the respective cases of the parties, its analysis of the circumstances, its reasoning and its conclusion. According to the citations brought to our notice and quoted earlier, the only mandate is that the government ought to have considered all the relevant circumstances; nowhere has it been laid that the government should write a judgment as such. It is not the contention of the learned counsel for the appellants that the government was influenced by irrelevant materials or circumstances. On the other hand, his argument was that the government failed to take into consideration all relevant circumstances, the most important one being the discrimination. Further, we have to point out that it is enough that the records of the government fairly indicate that the government had considered all relevant materials before it passed the impugned order. We have also had occasion to go through the files. Indeed, we have already made reference to certain pages. In our considered opinion, we are confident that the government had taken into consideration all the relevant factors before it passed the impugned order. It is essential at this stage to refer to the fact that in the impugned order though there is a reference to the letter dt. 31.7.1979 from the Commissioner of Labour, the order does not refer to the failure report submitted by the Commissioner of Labour on 30.8.1979. But it is relevant to notice that the said report is found in the file produced by the learned government advocate. This will clearly show that the government did take into consideration not only the report filed by the Labour Officer, Chingleput, but also the report of the Commissioner of Labour. Thus, we are unable to find anything to suggest that the Government had not considered all the relevant materials while it passed the impugned order.

27. Yet another point urged by the learned counsel for the appellants is that the government should have accepted the report of the Commissioner of Labour and if the government wanted to differ, it should give its reasons. In our view, the said argument is most untenable. There is no provision in the Act to warrant an imposition of such a duty on the government, under section 12(5) the government is bound to consider the report referred to in sub-section (4). Sub-section (4) in turn refers to the report of the conciliation officer. In this case, it is not in dispute that the conciliation officer is the Labour Officer, Chingleput. The Labour Officer had recommended refusal. It has to be remembered that the Commissioner of Labour had recommended a reference. According to us, unless there is mandate in law that the recommendation of the Commissioner of Labour is binding on the government or should be respected by the government, it is too difficult to accept the above argument. It might be that besides the report of the conciliation officer, the government also wanted to know the attitude of the Commissioner

of Labour. But that would not mean that the government is either bound by such report or to furnish weighty reasons to reject such report. In this case, it is seen from the government files and the impugned order that the government also took into consideration the report of the Commissioner of Labour, which is after all his opinion, having no statutory sanction. Thus, even this argument fails.

28. As the order to be passed by the government under section 10(1) is after all an executive one and it is left to the subjective satisfaction of the government to refer or not a dispute for adjudication, the appellants are not entitled to have *audi alteram partem* and rightly did the learned single Judge reject their contention. As we have to construe the Act and as we had enough guidance from several decisions referred to in this judgment, it is unnecessary to refer to the recommendations of International Labour Organisation nor to several passages referred to in the Book of Administrative Law by Wade.

29. In the result, the writ appeal fails and is dismissed. But we make no order as to costs.

B.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswamy and David Annoussamy, JJ.*

*W.A.No.232 of 1981. *12th July,* 1984.

A.Muthalif *Appellant**

v.

The Special Tahsildar, Harijan Welfare, Devakottai and another *Respondents.*

Land Acquisition Act (I of 1894), sections 4(1) and 6 - Discrepancy in description of land to be acquired in section 4(1) notification and section 6 - Declaration - Effect.

When the land proposed to be acquired is of a homogeneous nature, the fact of taking a portion on one side or the other would not make much difference. But when the land has specific features, each portion having certain precise advantage to the owner of the land, justice requires that the portion of the land to be acquired is described as accurately as possible in the notification under section 4(1) of the Land Acquisition Act itself. It is true that the final declaration is only under section 6. But such a declaration has to be made after considering the report made under section 5-A, which report consists of the enquiry on the objections arising out of the notification under section 4(1). Therefore the owner of the land should have been put in the position of being able to put forth his case properly in respect of the portion of land to be acquired. *[Para.8]*

Where there is a serious discrepancy between the descriptions of the land is the notification under section 4 and the declarations under section 6 and such a discrepancy had caused prejudice to the petitioner it vitiates the acquisition proceedings. *[Para.9]*

Cases referred to:-

Gangadhara v. State of Madras, (1964)2

M.L.J.334= I.L.R. (1964)1 Mad.273= 76 L.W.737= A.I.R.1964 Madras 237, *Babu Barkya Thakar v. The State of Bombay*, (1961)2 S.C.J.392= (1961)1 S.C.R.128= A.I.R.1960 S.C.1203; *Jammada Alvappa v. State*, (1979)2 Karn.L.J.401= A.I.R.1980 Karn.22.

S.Ramalingam, for Appellant.

Sadanand, Government Advocate, for 1st Respondent.

A.Ramanathan, for 2nd Respondent.

The Court delivered the following

JUDGMENT:- This writ appeal is against the order of a single Judge, in W.P.No.3754 of 1978 dated 31.3.1981.

2. The circumstances under which the writ petition was filed before this Court are as follows:

The Writ Petitioner is the owner of an extent of 0.65 acre of land bearing Survey No.339/1 in Tirupathur Town, Ramanathapuram District. The said land was notified in the Tamil Nadu Government Gazette for acquisition for the provision of house sites to Harijans of 11th ward of Tirupathur Town under section 4(1) of the Land Acquisition Act (hereinafter referred to as the Act). During the enquiry under section 5-A, the petitioner objected to the acquisition of the said land on the ground that the State Bank of India, Tirup-patur Branch and himself had entered into a contract as early as in September, 1976 and that consequently the Bank advanced Rs.90,000/- to the petitioner for the construction of the building as per the plan furnished by the Bank. The Land Acquisition Officer inspected the land proposed to be acquired and found that after the publication of the Draft Notification under section 4(1) of the Act in the Tamil Nadu Government Gazette, the petitioner laid foundation for the office building of the Bank on the northern portion of the land in S.No.339/1. The Land Acquisition Officer, proposed therefore, to acquire 0.65 acre out of 1.10 acres in S.No.339/1 on the southern side. Accordingly, a draft declaration was published under section 6 of the Act in the Tamil Nadu Government gazette dated 23.8.1978, stating that 0.65 acre out of the land in S.No.339/1 was needed for the public purpose *viz.*, provision of house sites to the Harijans at Tirupathur Town. Subsequently, notices under sections 9(3) and 10 of the Act were published and served in the manner prescribed under the rules. During the award enquiry, the petitioner reported to the Officer concerned that he had filed a writ petition in this court praying to quash the acquisition proceedings and, therefore, requested him to adjourn the enquiry. In fact petitioner prayed the High Court to issue a writ of Mandamus or any other appropriate writ, restraining the Special Tahsildar, Harijan Welfare, Devakottai Land Acquisition Officer from proceeding further on the matter in pursuance of the notices issued under sections 9(3) and 10 of the Act.

3. Before the learned Judge, the following two points were urged by the petitioner.

(1) The Land Acquisition Officer was not certain as to where exactly the extent of 65 cents has got to be measured and carved out of the land bearing S.No.339/1 having a total extent of 1.10 acres.

(2) There was a discrepancy in the description of the land proposed to be acquired between section 4(1) notification and section 6 declaration. The learned Judge found both the grounds of attack not acceptable and therefore, dismissed the writ petition by order dated 31.3.1981. It is against that order, the present appeal has been preferred.

4. In this appeal, the same two points were urged before us. It is seen that the land is described in section 6 declaration as:

"Ramanathapuram District, Tiruppathur Taluk, No.57, Tiruppathur Village. Ryotwari, wet S.No.339-1B belonging to Muthalif, son of Ayyathurai Ambalam, Tiruppathur town, bounded on the north by S.No.339-1A east by S.Nos.339-2, South by S.No.339-3 and west by S.No.338-065 acre."

This would suggest that the land is rectangular in shape. But the sketch prepared by the Special Surveyor, Mr.Periakaruppan, on 9.3.1981, which has been placed before us by the learned Government Pleader shows that the land to be acquired is in 'L' shape. In the declaration under section 6, it is stated that a plan of the lands is kept in the Office of the Special Tahsildar (Harijan Welfare), Devakottai for inspection at any time during office hours. The plan now presented is said to be the same as the plan which was kept in the Office of the Special Tahsildar at the time of the declaration. If it is so the verbal description of the land in the declaration under section 6 is certainly defective.

The land was described in the notification under section 4(1) as follows:

> "Ramanathapuram district, Tirupathur taluk, No.57, Tiruppathur village. Ryotwari, wet S.No.339-1, belonging to Muthalif, son of Ayyathurai Ambalam, bounded on the north by S.No.339-6, east by S.No.339-5 south by S.No.339 and west by S.No.338-0.65 acre."

5. It is seen from a comparison of the description of the land in the notification under section 4(1) and the one given in the declaration under section 6 that the land is described as S.No.339/1 in the notification under section 4(1), whereas in the declaration under section 6, it is described as S.No.339/18. The learned Government Pleader would state that the land bearing S.No.339/1 has been divided into two parts which have been described as 1-A and 1-B for the purpose of identification and that the portion of the land to be acquired was 339/1B from the beginning. He produced to that effect another sketch prepared by the said Mr.Periakaruppan, the Special Surveyor, on 9.3.1981 with a mention "sketch as on the date of 4(1) notification." In the said plan, the land shown as to be acquired is in 'L' shape as in the sketch referred to above. In the sketch of the village Tiruppathur prepared by the Special Tahsildar (H.W.), Devakottai on 30.6.1976, the land to be acquired is shown to be located in the northern portion of the land in S.No.339/1, whereas in the two sketches prepared by the Special Surveyor on 9.3.81, it is shown to be on the southern portion. Therefore, the sketch prepared on 9.3.1981 by the Special Surveyor, Mr.Peria Karuppan, as giving the description as on the date of section 4(1) notification is obviously wrong. Further, during the course of the enquiry under section 5-A, the appellant herein brought to the notice of the Land Acquisition Officer that the land proposed to be acquired was the one on which he had agreed to erect a building for the State Bank of India, Tirupattur Branch. In order to ascertain about the truth over this allegation, the Special Tahsildar, Devakottai wrote a letter to the State Bank of India, Tiruppattur on 29.3.1977 and the bank confirmed the existence of the agreement by reply dated 30th March, 1977. Again, the Special Tahsildar wrote a letter to the Bank on 4-4-1977 asking it whether the Bank has any objection to the acquisition of the land for provision of house sites to the houseless Harijans. The Bank replied on 9.4.1977 that the site was actually the one chosen for the building of the bank premises. Later, the writ petitioner wrote to the Special Tahsildar that in pursuance of an agreement with the bank, he had constructed a pucca building on the land under acquisition, which is now in the occupation of the bank. The Special Tahsildar the first respondent herein also in his counter-affidavit conceded the fact that the extent required for the construction of the office building on the southern side was left at the disposal of the petitioner and that the remaining extent *viz.*, 0.65 acres on the southern side alone was taken up for acquisition. In the teeth of his clear admission, it would be futile to contend that there was no shifting in the actual portion of the land to be acquired. Faced with this situation, the learned Government Pleader contended that the notification under section 4(1) was not final and that only the declaration under section 6 was conclusive and brought to our notice in support of his contention the following two decisions.

6. The first one is by the Supreme Court in *Babu Barkya Thakur v. The State of*

Bombay, (1961)2 S.C.J.392= (1961)1 S.C.R. 128= A.I.R.1960 S.C.1203 wherein their Lordships have held that the non-mention of the public purpose in section 4(1) notification does not matter and in this connection, they have observed as follows:

"...The purpose of the notification under section 4 is to carry on a preliminary investigation with a view to finding out after necessary survey and taking of levels, and, if necessary, digging or boring into the sub-soil whether the land was adapted for the purpose for which it was sought to be acquired. It is only under section 6 that a firm declaration has to be made by Government that land with proper description and area so as to be identifiable is needed for a public purpose or for a Company. What was a mere proposal under section 4 becomes the subject-matter of a definite proceeding for acquisition under the Act. Hence it is not correct to say that any defect in the notification under section 4 is fatal to the validity of the proceedings, particularly when the acquisition is for a company and the purpose has to be investigated under section 5-A or section 40 necessarily after the notification under section 4 of the Act."

7. The second decision is a Bench decision of this Court reported in *Gangadhara v. State of Madras*, I.L.R. (1964)1 Mad.237= (1964)2 M.L.J.334= 76 L.W.737= A.I.R.1964 Mad.237. In this decision, after quoting the observations of the Supreme Court as extracted above, it was held that the vagueness of the section 4(1) notification will not vitiate the proceedings and the fact that the subsequent declaration under section 6 fixed the area, inclusive of some more grounds in the same survey number, the property having described as situate in a particular locality, cannot invalidate the prior proceedings.

8. No doubt, when the land is of homogeneous nature, the fact of taking a portion in one side or the other would not make much difference. But when the land has got specific features, each portion having certain precise advantage to the owner of the land, justice would require that the portion of the land to be acquired as described as accurately as possible in the notification under section 4(1) itself. It is true that the final declaration is only under section 6. But such a declaration has to be made after considering the report made under section 5-A, which report consists of the enquiry on the objections arising out of the notification under section 4(1). Therefore, the owner of the land should have been put in a position of being able to put forth his case properly in respect of the portion of the land to be acquired. We are fortified in this view by a recent Bench decision of the Karnataka High Court reported in *Jammada Alvappa v. State*, (1979)2 Karn.L.J.401= A.I.R.1980 Karnataka 22 wherein it was observed that the declaration under section 6 of the Act notifying certain lands, which were not included in the preliminary notification issued under section 4 was not legal and as such cannot at all be sustained.

9. In the present case, the land proposed to be acquired is situate in a fast developing area near the bus stand and a higher elementary school, where the building of the office of State Bank of India, Tiruppattur Branch has also come up. Therefore, the land in question can no longer be considered as a cultivable land out of which a portion or other can be carved out. In fact, it is seen that from the beginning there was a consensus between the petitioner, the Land Acquisition Officer and the Bank that the land proposed to be acquired was the northern portion upon which the Bank building was to be erected and was subsequently erected. The writ petitioner while filing his objections under section 8-A had in mind only that portion and was not able to put forth his objections in respect of the southern portion now proposed to be acquired. Therefore, it is to be concluded that there is a serious discrepency between the descriptions of the land in the notification under section 4 and the declaration under section 6, that such a discrepency has caused prejudice to the writ petitioner-appellant and has vitiated the acquisition proceedings. It was also found earlier that the description of the land in the declaration under section 6 was also not proper. Therefore, both the grounds of attack urged

before us by the appellant are found be justified.

10. In the result, the appeal is allowed. The order of the learned single Judge is set aside. The land acquisition proceedings in respect of the land of the appellant are hereby quashed. There will be no order as to costs.

11. With reference to Article 134-A of the Constitution the learned Government Pleader prayed that leave may be granted. We are not satisfied that the proposed appeal to the Supreme Court raises any substantial question of law of general importance which needs to be decided by the Supreme Court. In the circumstances we refuse to grant leave.

B.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and G.Maheswaran, JJ.*

*Writ Appeal Nos.378 and 382 of 1983 against W.P.Nos.541/81 and 3975/82.
7th November, 1984.

S.Krishnamurthy and others *Appellants**

v.

Chairman, Departmental Promotion Committee III, C/o Inspectorate of General Stores, Central India, Kanpur and others *Respondents.*

(A) Public Services - Service Rules - Rules for promotion - Amendment on a certain day cannot apply to posts which fell vacant before that day.

(B) Constitution of India (1950), Article 226 - Petition for issue of mandamus.

Where the rules for promotion are amended on a certain day, that rule cannot be applied to the posts which fall vacant before that date and those posts are to be filled up only in accordance with the earlier rule. *[Para.9]*

Case referred to:-

Y.V.Rangaiah v. J.Sreenivasa Rao, (1983) Lab.I.C.1240= (1983)3 S.C.C.284= A.I.R.1983 S.C.852.

Appeal under clause 15 of the Letters Patent against the Order of Mr.Justice Padmanabhan, dated 22.4.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos.541/81 and 3975 of 1982 presented under Article 226 of the Constitution of India to issue Writs of Mandamus (1) restraining the respondents from reverting the petitioners pursuant to the instructions issued by the office of the Controller of Defence Accounts Pay Office, Madras-9 by its order made in No.PAY/MAA/AP/IV/514, dated 19/20/12/80. (2) forbearing the respondents from reverting the petitioner from the post of Supervisor Technical Grade III to any other post, pursuant to the instructions issued by the Office of the Controller of Defence Accounts Pay Office, Madras.

The Court delivered the following

JUDGMENT:- These appeals are directed against the common Judgment of Padmanabhan, J. in Writ Petitions Nos.541, 10551 of 1981 and 6457 of 1982 dismissing the writ petitions with certain observations.

2. The appellants joined the Defence Production Department as Viewers Grade C. Subsequently they were promoted as Viewers Grade B which was later re-designated as Examiners Grade II. In the category of Examiners, there were three grades, namely, (i) Examiners Grade II; (ii) Examiners Grade I and (iii) Selection Grade Examiners. The promotional post for all the three categories of Examiners is the post of Supervisor Technical Grade III. The selection for the said post is strictly by seniority among those who had passed a trade test in terms of S.R.O.No.109

of 1964 which has been framed under Article 309 of the Constitution of India. The said S.R.O.No.109 of 1964, as amended from time to time, prescribes the method of filling up the vacancies in the post of Supervisor Technical Grade III (hereinafter referred to as the Supervisor Technical). It is said that a trade test was held in 1973 and the appellants had passed the test and their names were therefore included in the selection list. They were also appointed as Supervisor Technical with effect from 1.9.1973. While so, on the basis of an audit objection that all the appellants were holding their post as Supervisor Technical on *ad hoc* basis for a long time and that they should either be regularised in service or reverted to their substantive post the respondents attempted to revert the appellants to the Post of Examiner Grade II. It is at that stage, the appellants have come before this Court seeking a writ of mandamus, directing the respondents not to revert them from the post of Supervisor Technical to their substantive post of Examiner Grade II.

3. The appellants' case was that since a panel has been prepared in 1973 on the basis of a trade test and their names having been included in that list and they having been promoted to the post of Supervisor Technical, they should be taken to have been appointed as Supervisor Technical on a substantive basis notwithstanding the fact that the orders of appointment proceeded on the basis that the appointments have been made *ad hoc* and on a temporary basis. It was their further case that even if the orders of appointment made in 1973 are taken to have been made on an *ad hoc* basis pending their regular promotions, the appellants are entitled to he regularised in the same post as they had already passed the required trade test and their names also have been included in the panel prepared in the year 1973. They also contend that in any event they are now entitled to be considered for promotion even if their temporary appointment cannot be regularised as they are qualified in all respects and their names already find a place in the panel for promotion.

4. The writ petitions were resisted by the respondents herein on the following grounds. The appellants were promoted as Supervisor Technical only on an *ad hoc* and temporary basis and that will not confer on them any right to the said post, that their appointment was not made on the basis of the panel as alleged by the appellants as the panel itself was finalised only long after their temporary promotion, that in view of the injunction order dated 4.11.1973 issued by the Allahabad High Court in W.P.No.4006 of 1973 filed by persons similar to the appellants forbearing the respondents from conducting the trade test for making the promotions, no regular promotions were made to the post of Supervisor Technical and the temporary appointments were continued and therefore, the appellants cannot seek regularisation of their temporary promotions and that regular promotions have to be made as per the rules, that though as the rules stood before 1975 the appellants could be considered for promotion in view of their inclusion in the panel they are not entitled now to be considered for promotion as the rules had been amended in 1975 removing the post of Examiner Grade II from the feeder categories for promotion to the post of Supervisor Technical.

5. On a due consideration of the rival contentions of parties, Padmanabhan, J. has dismissed the writ petitions holding (i) that the appellants' promotion as Supervisors Technical is only on an *ad hoc* and temporary basis and as such it will not create in them any right to the said post; (ii) that the appellants are not entitled to claim regularisation for their promotion as it was not on the basis of the relevant rules and on the basis of the panel finally approved and (iii) that in view of the amendment of the relevant rules in the year 1975 removing the post of Examiner Grade II from the feeder category for the post of Supervisor Technical, the appellants cannot now claim to be considered for promotion. In these appeals the views taken by the learned Judge have been questioned. Mr.Chidambaram, the learned counsel for the appellants, has reiterated the same three contentions which were urged in the writ petitions before the learned single Judge. Before considering the tenability or other-

wise of the appellants' contentions, it is necessary to refer to certain facts which have a bearing in this case.

6. As already stated, for the post of Supervisor Technical, the feeder categories before 1975 were: Examiner Grade II, Examiner Grade I and Selection Grade Examiners. The procedure to be followed in the matter of promotion has been laid down in the circular dated 9th November, 1967 issued to all the establishments of the Directorate General of Inspection, Organisations, by the Ministry of Defence, Government of India. That circular provides as follows. 'There should be a trade test held every year for promotion of industrial categories to Supervisor Technical Grade III." Though Viewers A and Viewers B are feeder categories for promotion to the post of Supervisor Technical Grade III, the first preference for taking the test for promotion will be given to Viewers A and if sufficient number of them are not available to take the test, Viewers B will be allowed to take the test and the inter-seniority of Viewers and other Tradesmen will be determined by the length of service in their respective grades. A total period of 5 years of service for all the grades of Viewers will count for eligibility for promotion. But out of the said period of 5 years, 3 years should be in the grade of Viewers A or B or Viewers A and B combined. The promotions out of the qualified candidates should be made strictly on the basis of seniority and not on the basis of their position of merit in the qualifying test. The duration of the panel prepared for promotion after the conduct of the trade test is one year and individuals not promoted during the currency of the panel are to appear afresh for the next trade test to become eligible for promotion. Based on the circular dated 9th November, 1967, referred to above and based on the result of the trade test held in August, 1973 at Kanpur, Shajahanpur, Madras and Bombay, two tentative panels for promotions to Supervisor (Technical) Grade III were drawn up, one for Viewers 'A' Examiners Grade I and Examiners (Selection Grade) Annexure 'A' and the other for Viewers 'B' Examiners Grade II - Annexure B. The said lists were sent by the Directorate of General Stores, Ministry of Defence, to all the Inspectorates for verification on th details of the seniority in respect of each individual and for report before approval is granted to the panels as prepared. The said lists were pending approval. The appellants were appointed by the Inspectorate of General Stores, South India, Madras, as Supervisors Technical Grade III on 9th November, 1973 with effect from 1st November, 1973, and the said order of appointment says the following:

> "The promotions have been made on *ad hoc* basis without any claim or title to seniority and will remain operative for a period of 3 months WEF/1 Nov.73 (FN) or till regular promotees are posted/positioned, whichever is earlier."

In pursuance of the said appointment order, the appellants began officiating in the post of Supervisor Technical Grade III. In the meanwhile, writ petitions had been filed by persons like the appellants before the Allahabad High Court for forbearing the respondents from conducting the trade test and making promotions to the post of Supervisor Technical till the writ petitions were disposed of. The writ petitions were finally heard and dismissed by that Court on 28.1.1981. In view of the interim orders passed by the Allahabad High Court not to make promotions for the post of Supervisor Technical. the appellants were allowed to officiate in the post of Supervisor Technical temporarily until the regular promotions were made. But the respondents had chosen to take an undertaking from the appellants to the effect that if the Government decided to revert them retrospectively, they would have no objection to such reversion. After the disposal of the writ petitions by the Allahabad High Court in the year 1981, the Government have chosen to fill up the vacancies in the post of Supervisor Technical Grade III by making the regular selections but, of course, excluding the category of Examiners Grade II to which the appellants belonged on the ground that they were not entitled to be considered for promotion in view of the amended rules under which Examiner Grade II is not a feeder category. It is in the light of these facts and circumstances the

contentions of the appellants have to be considered.

7. As already stated, the appellants' contentions are three-fold. The first is that the order of appointment, though on the face of it appears to be temporary and *ad hoc*, it should be taken to be regular appointment order in view of the fact that the appellants have already been empanelled after the trade test and their appointment is based on the said panel and as such, they have acquired a right to the post. This contention has been rejected by Padmanabhan, J. and we are inclined to agree with him. When the order or appointment specifically says that it is only *ad hoc* for a period of 3 months, we do not see how it could be construed as a regular appointment on a permanent basis. It is no doubt true that the appellants' names are found in the proposed panel circulated for verification as to the particulars of seniority in the letter dated 9th November, 1973. But, that is only a tentative list which has finally to be approved by the Directorate General of Inspection. The regular promotion has to be made as per the rules only by the Directorate General of Inspection. In this case the order of promotion has been made by the Inspectorate in Madras. Therefore, the order of appointment dated 1.11.1973 passed by the Inspectorate in Madras cannot be construed as a regular promotion which can be made only by the Directorate General of Inspection. Hence the above contention advanced by the learned counsel for the appellants has rightly been rejected by the learned single Judge.

8. Coming to the second contention that even if the order of promotion dated 9.11.1973 is to be treated as an *ad hoc* and temporary one, the appellants, in view of their continued officiation in the post of Supervisor Technical should have been entitled to be regularised. We find that this contention also has no merit for the regularisation will arise only if the order of appointment has been made by the proper authority in pursuance of the rules relating thereto. In this case, as already stated, the appointment has been made temporarily by the local Inspectorate and not by the Directorate General of Inspection which is the authority to make the promotion. The mere fact that they continued to officiate as Supervisor Technical will not enable them to be regularised as it is likely to affect others who are also entitled to be considered for promotion. It is no doubt true that the appellants' names found a place in the provisional list prepared in 1973 and which has been approved later. However, the currency of the list is only for one year as per the procedure laid down by the Directorate General of Inspection in its circular dated 9th November, 1967, which specifically says that the duration of the panel for promotion is one year only and individuals not promoted during the currency of the panel are to appear afresh for the next trade test to become eligible for promotion. Therefore, merely on the basis that the appellants' names found a place in the panel prepared for the year 1973, they cannot seek regularisation of their temporary appointment now. Therefore this contention also fails.

9. Coming to the third contention that in any event the appellants are entitled to be considered for promotion at least after the judgment of the Allahabad High Court dismissing the writ petitions filed by certain other persons, the stand taken by the respondents is that the relevant rules had been amended in the year 1975 under which Viewers B/Examiners Grade II had ceased to be a feeder category for the post of Supervisor Technical and therefore they cannot any longer be considered for promotion. It is pointed out by the respondents that after the judgment of the Allahabad High Court dated 28.1.1981 dismissing the writ petitions, they have been conducting trade tests and preparing panels for each year and on the basis of the panel they had been effecting promotions. Since the substantive category to which the appellants belonged has ceased to be a feeder category, they were naturally not called for trade test nor were considered for promotion. Mr.Chidambaram, the learned counsel for the appellants, contends that the amendment brought about in the year 1975 removing the category of Viewers B Examiners Grade II from the feeder category can only be operative in future

and that it cannot operate in respect of vacancies which arose before the amendment and therefore for all vacancies that arose before the amendment was brought in 1975, the appellants are entitled to be considered for promotion as until the date of amendment, the category of Examiner Grade II was a feeder category. However, Mr.Thyagarajan, the Senior Central Government Standing Counsel for the respondents, contends that in respect of all the promotions that are to be made after 1975 the amended rules were to apply and as per the amended rules the appellants cannot claim promotion as their category is no longer a feeder category. On this aspect of the case, Mr.Chidambaram, the learned counsel for the appellants, relies on the decision of the Supreme Court in *Y.V.Rangaiah v. J.Sreenivasa Rao*, (1983) Lab.I.C.1240= (1983)3 S.C.C.284= A.I.R.1983 S.C.852 which lays down that in respect of promotions any amendment of the relevant rules cannot apply to vacancies which arose before the amendment. In that case, rule 5 of the Andhra Pradesh Registration and Subordinate Service Rules had been amended in 1977. Before the amendment the Lower Division Clerks were eligible for appointment by transfer as Sub-Registrar Grade II under old rule 5. Rule 5 had been amended in the year 1977 whereby the rule providing for consideration of Lower Division Clerks for appointment as Sub-Registrar Grade II was done away with and promotion or transfer to that category was made from amongst the Upper Division Clerks only. The question arose as to whether the said amended rule could be applied in respect of vacancies that arose before the amendment. Dealing with that question, the Supreme Court observed as follows:

> "...Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos.3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the Statewide basis and therefore, there was no question of challenging the new rules. But the question is of filing the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

This is a clear authority for the proposition that where the rules for promotion are amended on a certain day, that rule cannot be applied to the posts which fell vacant before that date and those posts are to be filled up only in accordance with the old rule. In this case, from 1.11.1973 to 28.1.1981, no regular appointments were made to the post of Supervisor Technical in view of the interim orders passed by the Allahabad High Court. In the meanwhile the rules had been amended in the year 1975 removing the post of Examiner Grade II from the feeder category. If the appointments had been made then and there before the rule was amended, the appellants could have been considered for promotion for before the amendment they were duly qualified for consideration. The mere fact that the rules were amended in 1975 will not take away the appellants' claim for promotion on the basis of the rule then in existence. Thus, following the said judgment of the Supreme Court, we have to hold that the appellants are entitled to be called for trade test and if successful to be included in the panel prepared for each of the years from 1973 until the date of the amendment.

10. Mr.Thyagarajan, the learned counsel for the respondents, would say that the appellants have merely prayed for a mandamus from this court not to revert them and they have not sought any relief specifically seeking consideration of their claim for promotion for the period anterior to the date of the amendment of the rule.

It is well established that even if the appellants have not asked for a particular specified relief, it is always open to the court, having regard to the circumstances of the case, to mould the relief to be given to the appellants consistent with their rights. Therefore, we are not inclined to dismiss the writ appeals straightway merely on the ground that the appellants have not sought any relief directing the respondent to consider their claim for promotion for the period anterior to the date of the amendment of the rules. Though the relief claimed by the appellants is different, the facts established in this case warrant the granting of a limited relief directing the respondents to permit them to appear for the trade test in respect of vacancies that arose before 1975 and consider their claim for promotion if they are successful therein.

11. The writ appeals are, therefore, allowed in part. Thus, though we are not in a position to grant the relief of mandamus directing the respondents not to revert the appellants, the appellants are entitled to get a direction to the respondents to consider their claim for promotion in respect of vacancies that arose before the date of the amendment on the basis of the old rules. There will, however, be no order as to costs.

B.S. —— *Appeals allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

Present:- *G.Ramanujam and G.Maheswaran, JJ.*

*Writ Appeal No.985/83 against W.P.No. 5505/81. 1st *February,* 1985.

M.Sundaramoorthy *Appellant**

v.

Inspector General, Central Industrial Security Force, New Delhi and others *Respondents.*

Central Industrial Security Force Act (V of 1968), section 8 and Central Industrial Security Force Rules (1968), rule 34(9) - Scope - Appellant working as security guard - Charges of indiscipline and insubordination made - Enquiry held and dismissal order passed - Validity of order challenged.

On the question *inter alia* whether disobeying the oral orders issued by the superior would make a member of the Security Force unfit to be a security guard so as to attract a major penalty contemplated by section 8(1) of the Central Industrial Security Force Act,

Held:- The disobedience of the orders of superiors while in a Force like the Central Industrial Security Force which is intended to give better protection and security for the various industrial undertakings cannot be treated lightly, as good order, regularity and discipline is the hall mark of such a security force. Once the appellant is found to have disobeyed the orders of the superiors it can be taken that he had made himself unfit to be a member of the Force and that is sufficient to attract section 8(1). *[Para.10]*

Cases referred to:-

Khemchand v. The Union of India, 1958 S.C.J.497= (1958)1 An.W.R. (S.C.) 169= (1958)1 M.L.J. (S.C.) 169= 1958 S.C.R. 1080= A.I.R.1958 S.C.300; *Fateh Bahadur Singh v. Union of India,* (1979) Lab.I.C.

1102= (1979) S.L.J.607.

Appeal under Clause 15 of the Letters Patent against the Order of Mr.Justice Mohan dated 25.8.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.5505 of 1981 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records of respondent in No.V.11014/17/79 L. and R. dated 25.7.1979 on the file of the 1st respondent and in No.V.110104/124/78-A6 (S.Z.)/127, dated 30.1.1979 on the file of the 2nd respondent respectively and to quash the order of the 3rd respondent in V-11014/1/M.R.77-P-A/8951 dated 2.11.1978 confirmed by the orders of respondents 2 and 1 dated 30-1-1979 and 25-7-1979, respectively.

R.V.Nallasivam, for Appellant.

R.Thiagarajan, Senior Central Government Standing Counsel, on behalf of Respondents.

The Court made the following

ORDER:- This Writ Appeal is directed against the judgment of Mohan, J. in W.P.No.5505 of 1981.

2. The said writ petition was filed by the appellant herein for the issue of a writ of *certiorari* from this court to quash the order of the first respondent herein dated 25.7.1979 which confirmed the order of the second respondent dated 30.1.1979 which in turn confirmed the order of the third respondent dated 2.11.1978.

3. The facts leading to the filing of the said writ petition may briefly be noted. The appellant was working as a security guard in the Central Industrial Security Force since 1971 and was attached to the Central Industrial Security Force Unit, Madras Refineries Limited, Manali, during the year 1976-77. He was on duty at the railway gate post from 23.00 hours on 4.8.1976 to 0700 hours on 5.8.1976. At 0415 hours, Assistant Sub-Inspector Joseph while on checking rounds asked the appellant to produce his beat book which the latter flatly refused. In addition he abused the Assistant Sub-Inspector with threatening gestures. On the same day at about 0500 hours when one S.Srinivasan conveyed the orders of the duty officer that the appellant is to be relieved by him, the latter refused to hand over charge to the former. Treating the said conduct of the appellant as amounting to gross indiscipline and insubordination, a charge memo dated 6.8.1976 was served on him containing the following three charges by the Assistant Commandant.

(1) Disobedience of lawful orders of Assistant Sub-Inspector, K.I.Joseph, Duty Officer, C.I.S.F, M.R.L. at L.P.G/Asphalt area on 5th August, 1976 at about 04.15 hrs.

(2) Gross indiscipline against A.S.I.K.I.Joseph Duty Officer, C.I.S.F./M.R.L. at L.P.G. Asphalt area on 5th August, 1976 at about 04.15 hrs.

(3) Disobedience of lawful orders of A.S.I.K.I.Joseph, Duty Officer C.I.S.F/M.R.L. at L.P.G. area on 5th August, 1976 at about 0500 hrs.

He was asked to submit his explanation on 13.8.1976. After receipt of his explanation on 13.8.1976 there was an oral enquiry in which 3 witnesses were examined on the side of the Department and they were cross-examined. On the basis of the evidence gathered at the time of the enquiry and other relevant records, the enquiry officer found that the charges framed against the petitioner were proved. Accepting the findings of the enquiry officer, the third respondent the Disciplinary Authority issued a second show cause notice calling upon the appellant to put forth his further representations and proposing a punishment of dismissal from service for the charges found to have been proved. The appellant submitted his further representations on 9.9.1976. The third respondent by his order dated 2.11.1976 dismissed the appellant from service from the date of receipt of the order. Thereupon the appellant filed an appeal to the second respondent-the Appellate Authority who, by his order dated 11.4.1978, set aside the order of the third respondent and directed reinstatement of the appellant in service giving liberty to the disciplinary

authority to hold a *de novo* enquiry from the stage of issuing the fresh charge memo after holding that the enquiry officer (Assistant Commandant) has not been properly constituted nor did he obtain the sanction of the appointing authority to hold the enquiry against the appellant. Thereafter the appellant was reinstated and a fresh charge memo was issued against him by the third respondent, Group Commandant, on 7.7.1978 containing the same three charges. On receipt of the appellant's explanation on 26.7.1978, the Assistant Commandant, P.S.Panicker was appointed as the enquiry officer on 1.8.1978. This time four witnesses were examined on the side of the Department and one witness on the side of the appellant. The enquiry officer, after considering the evidence found the appellant guilty of all the three charges. A show cause notice proposing punishment of removal from service was issued by the Group Commandant, the third respondent, on 25.9.1978. The appellant submitted his explanation on 21.10.1978. The third respondent passed final orders on 2.11.1978 removing the appellant from service. The appellant again filed an appeal against the said order to the second respondent which was, however, rejected. A revision was thereafter filed by the appellant to the first respondent and that was also dismissed on 25.7.1979. Thereafter the appellant filed the above writ petition seeking to quash all the orders of the respondents herein.

4. In the said writ petition the main attack against the order of removal from service is that the enquiry stands vitiated by the violation of the principles of natural justice. He complained that he was not furnished with a copy of the complaint and the statements made by varius persons during the preliminary enquiry in spite of his specific requests and this has vitiated the enquiry. Another ground of attack is that there is no application of mind by the third respondent on the question as to whether the charges are proved by the evidence available in the case. Both the grounds of attack had been rejected by Mohan, J. on the ground that the appellant was given opportunity to take extracts of the report of the original complaint and also the statements of other persons made at the preliminary enquiry and that though the disciplinary authority has not specifically approved the findings of the enquiry officer, from the facts of the case it can be assumed that the disciplinary authority agreed with the findings of the enquiry officer.

5. In this appeal the grounds of attack against the order of removal from service are five-fold. They are (i) there has been a violation of rule 34(9) of the Central Industrial Security Force Rules, 1969; (ii) The principles of natural justice stand violated as the copies of the relevant documents have not been furnished to the appellants during the enquiry; (iii) There was no reasonable opportunity given to the appellant at the stage of the second show cause notice; (iv) As regards charge No.3, the enquiry is vitiated by official bias and (v) In any event the quantum of the punishment is excessive.

6. From the above narration, it will be seen that the fourth and the fifth grounds of attack had not been considered by the learned single Judge even though the point has been raised in the affidavit filed in support of the writ petition. We now proceed to consider the tenability of the above grounds of attack.

7. So far as the first ground urged by the appellant that there has been a violation of rule 34(9) is concerned, it is seen that the said provision is as follows:

> "34. *Procedure imposing major penalties:-*
> ************************************
> (9) The disciplinary authority shall, if it is not the Inquiring Authority referred to above, consider the record of the inquiry and report its findings on each charge."

According to the appellant, the disciplinary authority has overlooked the said provision and he merely affirmed the findings of the enquiry officer. Therefore, the ultimate order imposing penalty is vitiated. However, a perusal of the final order passed by the third respondent shows that he has considered each charge separately

reference to the evidence and recorded his findings. Though there is no elaborate discussion about the oral and other evidence, as has been done by the enquiry officer, it cannot be said that the disciplinary authority did not consider each charge with reference to the records of enquiry and did not come to his own conclusion. From the final order it is seen that there is application of mind on the part of the disciplinary authority on each charge and it is only after applying his mind, the disciplinary authority has come to the conclusion that the charges stand proved on the materials on record. It is not, therefore, possible to say that rule 34(9) stands violated in this case as alleged by the appellant.

8. Coming to the third ground that there was no reasonable opportunity given to the appellant at the second show cause notice stage, it is seen that the second show cause notice containing the provisional conclusion was issued by the third respondent on 25.9.1978 and the appellant has submitted his representations on 21.10.1978. In those representations he has asked for a personal hearing through his counsel and since such a personal hearing was not given, the appellant claims that the final order is vitiated. It is no doubt true in this case that the appellant was not given a personal hearing through his counsel after the second show cause notice was issued and before the final orders were passed. But it is to be remembered that even at the stage of the enquiry before the enquiry officer, the appellant was not represented by a counsel and in those circumstances to ask the disciplinary authority for an opportunity of personal hearing through the counsel is not a reasonable request. Therefore the mere fact that the appellant was not given a personal hearing through the counsel before the final orders were passed by the disciplinary authority cannot be said to violate the principles of natural justice. The learned counsel relies on the decision of the Supreme Court in *Khem Chand v. The Union of India and others*, (1958) S.C.R. 1080= (1958) S.C.J.497= (1988)1 An.W.R. (S.C.) 169= (1958)1 M.L.J. (S.C.) 169= A.I.R.1958 S.C.300 wherein the Supreme Court has pointed out as follows:

"It is true that the provision (Article 311(2)) does not, in terms, refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity but such opportunity must be a reasonable one. In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the Government servant should have the opportunity, to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves. Both these pleas have a direct bearing on the question of punishment and may well be put forward in showing cause against the proposed punishment."

We do not see how the said decision of the Supreme Court helps the appellant in this case. Here the appellant merely asked for a personal hearing through his counsel. It cannot be said that in all cases the refusal to permit a counsel to appear before the domestic tribunals can be said to be a denial of reasonable opportunity to defend. Having regard to the fact that in this case the enquiry was conducted in his presence and he had the opportunity to cross-examine the witnesses, the disciplinary authority might have felt that there was no justification for the grant of the appellant's request for an oral hearing through a counsel. Thus we find that the complaint of the appellant that no reasonable opportunity was given at the second show cause notice stage cannot legally be sustained.

9. Coming to the fourth ground of attack that there is an official bias on the part of the disciplinary authority, it is seen that the disciplinary authority is different from the Assistant Sub-Inspector who during the course of his routine inspection, ordered the appellant to hand over duty charge at the railway gate post to P.W.4 another

employee. It is for the disobedience of that order the third charge came to be framed. Here the disciplinary authority himself has framed the charge and the charge is that he disobeyed the orders of the Assistant Sub-Inspector who is superior to the appellant. We do not see how an inference of bias could be inferred here. Even if some sort of bias could be inferred from the facts, such official bias cannot be taken to vitiate the enquiry. In the nature of things such administrative and official bias cannot be taken to have vitiated the ultimate order passed after due enquiry. Therefore, the complaint of bias against the disciplinary authority as regards charge No.3 has to fail. With reference to this complaint, the case of the appellant that since no written order has been issued to him to hand over charge and an oral order alone has been communicated to him through P.W.4, he will be within his rights not to obey such orders. In a security force to which the appellant belonged, he cannot insist on written orders and he had to obey even oral orders passed by superiors. It has been pointed out by the appellate authority in this case in his order dated 30.1.1979 as follows.

> "It is a common feature that a SG is sent to relieve another S.G. for many purposes and it is not always possible to send written orders for this purpose. The appellant would have been fully covered had he taken the signature of P.W.4 on his beat book and got him to write that as per orders of the duty officer he is relieving the appellant. Subsequently if there was any dispute it would have been P.W.4's responsibility and not that of the appellant. His failure to thus hand over charge was clearly a disobedience of orders which had been communicated to him by P.W.4."

In this case P.W.4 who is a co-employee has deposed at the enquiry that an oral order directing the appellant to hand over charge to him was made by the higher authority but the appellant refused to obey the same. Having regard to the admitted position that he refused to hand over charge on oral orders issued by his superiors which stands established, there is no question of any official or administrative bias vitiating the enquiry.

10. Coming to ground No.5 relating to the quantum of punishment, reliance has been placed by the learned counsel for the appellant on section 8 of the Central Industrial Security Force Act, 1968 for the proposition that the punishment of removal meted out to the appellant cannot be justified thereunder. Section 8 deals with dismissal, removal or reduction in rank of any member of the Security Force. That section is as follows:

> "8. Dismissal, removal, etc. of members of the Force - Subject to the provisions of Article 311 of the Constitution and to such rules as the Central Government may make under this Act, any supervisory officer may-
>
> (i) dismiss, suspend or reduce in rank any member of the Force whom he thinks remiss or negligent in the discharge of his duty, or unfit for the same, or
>
> (ii) award any one or more of the following punishments to any member of the Force who discharges his duty in a careless or negligent manner, or who by any act of his own renders himself unfit for the discharge thereof, namely:-
>
> (a) fine to any amount not exceeding seven days' pay or reduction in pay scale;
> (b) drill, extra guard, fatigue or other duty,
> (c) removal from any office of distinction or deprivation of any special emolument.

According to the learned counsel for the appellant, dismissal, removal and reduction in rank of any member of the force can be resorted to only when the member of the Force has been remiss or negligent in the discharge of his duties or unfit for the same and if a member of the Force who discharges his duty in a careless or a negligent manner or who by any act of his own rendered himself unfit for the discharge thereof can only be punished

with fine not exceeding seven days' pay or reduction in pay scale or the extra drill guard or other duty. In this case, the appellant having been found to have discharged his duty in a negligent manner he can be only subjected to a minor penalty contemplated by section 8(ii) and not to a major penalty contemplated by section 8(i). The appellant's case is that the fact that he disobeyed an oral order issued by the superior has not made him unfit for the post and therefore section 8(i) cannot be invoked. However, we are of the view that the disobedience of the orders of superiors while he is in a Force like the Central Industrial Security Force which is intended to give better protection and security for the various industrial undertakings cannot be treated lightly as good order, regularity and discipline is the hall-mark of such a Security Force. Once the appellant is found to have disobeyed the orders of the superiors, it can be taken that he has made himself unfit to be a member of the Force. That is sufficient to attract section 8(i). Therefore, we are of the view that there is no violation of section 8 of the Act as contended by the learned counsel for the appellant.

11. In ground No.2 the appellant had also complained that he had not been given the copies of the original complaint and the statements made by various persons at the stage of the preliminary enquiry and the non-supply of the copies thereof amounted to violations of principles of natural justice. We find that the appellant was actually permitted to inspect the documents and the statements and also to take extracts therefrom and it is only after taking such extracts, he cross-examined the witnesses at great length. Further it is seen that the contents of the original report have been set out in annexure 2 of the charge memo and therefore, the appellant cannot be taken to have been prejudiced by the non-supply of the copies of the original report and the statements taken at the preliminary enquiry. It has been held by the Supreme Court in *Fateh Bahadur Singh v. Union of India and others*, (1979) Lab.I.C.1102= (1979) S.L.J.607 that mere procedural irregularity in the conduct of the enquiry will not vitiate the same unless substantial prejudice is established to have been caused to the persons against whom the disciplinary action has been taken and any procedural irregularity in the conduct of the disciplinary proceedings is more a consideration to be taken into account by an appellate or revisional authority than by the civil court. In that case, after the closing of the evidence on behalf of the disciplinary authority and after the defence had filed its statement of defence, fresh evidence was let in on behalf of the disciplinary authority at the enquiry and that was questioned as having vitiated the enquiry and the final order passed thereon. The Supreme Court held that the induction of new evidence after the closing of the case by the prosecution may, amount to only irregularity and that such irregularity unless shown to have been prejudicial to the case of the defence, cannot be taken to vitiate the enquiry. In that case the defence was held not prejudiced by the letting in of the new evidence after the prosecution has closed its case, as the enquiry officer gave a further opportunity to the defence to file its additional statement of defence as a result of the new evidence having been let in by the prosecution. In this case, as already stated, the original report and the statements taken at the preliminary enquiry have been given inspection of and the appellant had also taken extracts therefrom. Therefore, the mere non-supply of the copies of those documents in full cannot be taken to vitiate the enquiry unless prejudice is shown to have been caused. Before us the learned counsel for the appellant was not in a position to show how the non-supply of the copies as such had disabled the appellant in the conduct of his defence.

12. Thus all the contentions urged by the appellant having failed, the writ appeal fails and is dismissed. There will, however, be no order as to costs.

B.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

Present:- *G.Ramanujam and G.Maheswaran, JJ.*

*Writ Appeals Nos.349 to 351 of 1983.
11th December, 1984.

R.Umraomal and others *Appellants**

v.

The State of Tamil Nadu represented by the Secretary to Government, Revenue Department, Fort St. George, Madras and another *Respondents.*

Land Acquisition Act (I of 1894), section 3(f) - Public purpose - What is - Held acquisition must involve the general interest of the whole community.

Where the acquisition was sought to be made to accommodate thirty-two tenants of the premises belonging to the appellants who had defaulted in paying the rents against some of whom the appellants had procured orders of eviction and decrees for possession, whether the purpose would be a 'public pupose',

Held:- The proper approach would be to consider the scheme as a whole and examine whether the entire scheme is for a public purpose or not. This is not a case of landless poor being provided with shelter, but accommodating the very tenants of the appellants who have defaulted. It cannot be said that the welfare of the large section of the community is concerned. The Court has not been shown any precedent or incident where the Government have acquired buildings for accommodating the tenants of these buildings. The acquisition is meant for the particular interest of the individual tenants of the appellants and therefore, does not involve the general interest of the community as a whole. *[Para.6]*

Cases referred to:-

Deputy Collector, Calicut Division v. Aiyavu, (1911) 9 I.C.341; *Sherrer v. Shields,* (1914) A.C.808; *Hamabai Framjee Petit v. Secretary of State,* L.R. (1915) 42 I.A. 44= 28 M.L.J.179= 2 L.W.191= A.I.R.1914 P.C.20; *Somawanti v. State of Punjab,* (1963)2 S.C.J.35= (1963)2 M.L.J. (S.C.)18= (1963)2 An.W.R.(S.C.) 18= (1963)2 S.C.R.-774= A.I.R.1963 S.C.151; *Arnold Rodricks v. State of Maharashtra,* (1966)3 S.C.R.885= A.I.R.1966 S.C.1788.

Appeal under Clause 15 of the Letters Patent against the Order of Mr.Justice Mohan dated 8.3.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petitions Nos.1837, 1836 and 1835 of 1982, presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari* calling for the records of the respondents relating to the proceedings made in G.O.Ms.No. 68/Revenue, dated 11.1.1982 published in Tamil Nadu Government Gazette, Extra-ordinary, Part II, section 2, dated 12.1.1982 and the notification, dated 15.12.1980 made in G.O.Ms.No.2753/Revenue Part II section 2, dated 31.12.1980 and quash the same insofar as the petitioner in each of the petitions is concerned.

Doha, for Appellants.

The Court made the following

ORDER:- These three appeals, W.A.Nos.349, 350 and 351 of 1983, are against the common judgment rendered in Writ Petitions Nos.1837, 1836 and 1835 of 1982 respectively by Mohan, J. dismissing the writ petitions of the appellants praying for issuance of a writ of *certiorari* quashing the proceedings in G.O.Ms.No.68, Revenue, dated 11.1.1982, and the notification dated 15.12.1980 in G.O.Ms.No.2753, Revenue.

2. The father of Umraomal and Jawantharaj, appellants in W.A.Nos.349 and 350 of 1983 respectively, purchased certain buildings in R.S.No.80 and R.S.No.82/2 of an extent of 5 grounds and 1030 sq. feet of Tondiarpet village in the year 1928 and 1931. The Government granted lease of the land on 12.7.1941 on a yearly rent of Rs.500/-. They were living with the members of their families in the buildings constructed by them and they have also built certain shops in the ground floor and let them out to certain tenants. But

the tenants committed default in the payment of rent which resulted in the appellants taking proceedings in eviction. Orders were passed evicting the tenants, but still they continued to squat on the property and they formed an association known as "Royapuram Cemetery Road Merchants Sangam" consisting exclusively of the tenants under the appellants. They made certain untrue representations to Government and were able to persuade the Government of Tamil Nadu to terminate the lease in favour of the appellants. The Government directed the appellants to remove the superstructures. The appellants then moved this Court and filed Writ Petitions Nos.4154, 4180 and 4181 of 1978 and this Court observed that the proper remedy for them is to approach the Government and also directed the Government to explore the possibility of acceding to the request of the appellants. In pursuance of this order, the appellants moved the Government bringing it to the notice of the Government that they have spent nearly Rs.4,50,000/- their life savings. The Government examined the matter and passed G.O.Ms.No.2730, Revenue, dated 11.12.1980 giving up the proposal for demolition of the superstructure, but agreed to pay compensation for the value of the superstructure. Under these circumstances, a notification under section 4(1) of the Land Acquisition Act in G.O.Ms.No.2753, Revenue, dated 15.12.1980 came to be passed. The notification stated that the public purpose for which the acquisition is made is to provide "shopping facilities to small traders and self employed persons." An objection was also filed by the petitioner in W.P.No.1835 of 1982 in response to a notice under section 5-A of the Act, but it was overruled and a declaration under section 6 of the Land Acquisition Act was made in G.O.Ms.No.68, Revenue, dated 11.1.1982 and it was also published in the Tamil Nadu Gazette Extraordinary Part II Section 2, dated 12.1.1982. The declaration is in the usual statutory form stating that the Government has been satisfied that the superstructures on the land have to be acquired for public purposes. It is under these circumstances that the writ petitions were filed. The acquisition was attacked on various grounds, the important of which are: (1) that the proceedings under the Land Acquisition Act cannot be resorted to acquisition of superstructures alone; (2) that the Government is actuated by malice; and (3) that the Government should have resorted to proceedings under the Tamil Nadu Requisitioning and Acquisition of Immovable Property Act, 1956. The learned single Judge held that the Government can acquire the superstructure as the land belongs to Government, that there are no *mala fides* in the case, that the acquisition is for a public purpose, that it is open to Government to take proceedings having recourse to Central Act or to the Tamil Nadu Requisitioning and Acquisition of Immovable Property Act, 1956 and in the end the learned Judge dismissed the petitions. These appeals are preferred against that order.

3. Mr.Dolia, learned counsel appearing for the appellants, attacked the order on almost the same points as were raised before the learned single Judge, but laid particular stress on the fact that the purpose mentioned in the notification under section 4(1) of the Land Acquisition Act, is not a public purpose. The other contentions are that the Government cannot resort to Land Acquisition Act, but has to resort to the Tamil Nadu Requisitioning and Acquisition of Immovable Property Act, 1956, that the acquisition of the building alone under the provisions of the Land Acquisition Act will not be valid and that the proceedings of the Government were motivated by *mala fides*.

4. The notification in G.O.Ms.No.2753, Revenue, dated 15.12.1980 shows that the Government of Tamil Nadu intended to acquire "the superstructures on the land in R.S.Nos.80 and 882/2 in Tondiarpet village, Tondiarpet Taluk, Madras District, for the purpose of assigning the Lands and the Superstructures thereon to provide for "shopping facilities to small traders and self-employed persons. The impugned declaration under section 6 of the Land Acquisition Act, 1894 reads that the superstructures on the lands specified in the schedule are needed for a public purpose, to wit, for the purpose of assigning the lands and the superstructures thereof to provide for shopping facilities

to small traders and self-employed persons. The contention of the learned counsel, Mr.Dolia, for the appellants is that the Government should have resorted to the Tamil Nadu Requisitioning and Acquisition of Immovable Property Act, 1956 as that is the special enactment for acquisition of buildings and should not have resorted to the Land Acquisition Act, 1894, which is a Central enactment which provides for acquisition of land for public purposes and for companies, and in fact in one of the grounds in the memorandum of appeal, it has been pointed out that the notification under the provisions of the Land Acquisition Act is void and without jurisdiction. This contention, in our view, is not well-founded for the simple reason that under section 3 of the Land Acquisition Act (Act I of 1894), the expression "Land" includes things attached to the earth or things permanently fastened to anything attached to the earth. Secondly it must be noted that the lands in question belong to Government and the appellants are lessees of the land. It is therefore clear that the Government did not propose to acquire what was already their own, but only the superstructures built upon their lands. In *Deputy Collector, Calicut Division v. Aiyavu*, (1911)9 I.C.341 Wallis, J. as he then was, observed:

> "It is, in my opinion, clear that the Act does not contemplate or provide for the acquisition of any interest which already belongs to Government in land which is being acquired under the Act, but only for the acquisition of such interests in the land as do not already belong to the Government."

It is therefore manifest that when the Government is the owner of the land, it need not acquire the land, because there can be no question of Government acquiring what is its own. It has therefore to acquire only the superstructures which stood on the land belonging to it and such an acquisition can be made under the Land Acquisition Act (Act I of 1894). We are therefore of the view that the Government was not wrong in resorting to Act I of 1894. That disposes of one of the challenges made to the impugned notification.

5. The appellants would state that the Government have been actuated by malice at the instance of the defaulting tenants and the tenants were able to bring pressure on the Government through political intervention and persuade the Government to take proceedings for acquisition (Paragraph 6(f) of the affidavits in the writ petitions) and that the Government is keen on supporting the tenants for political reasons. It would be very difficult for the appellants to prove malice. But the learned counsel, Mr.Dolia, for the appellants pointed out that the Government is only guilty of malice in law. Viscount Haldane described malice in *Sherrer v. Shields*, (1914) A.C.808 at page 813 as follows.

> "A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently."

It is likely that the Government have terminated the lease of the appellants and have sought to acquire the superstructure on the representations made by the Royapuram Cemetery Road Merchants Sangam which consists of the tenants of the appellants' premises. But, if the Government uses the power of acquisition under the Land Acquisition Act for fulfilment of an object which, in its view, is for public purpose, then we cannot say that the act of the Government is actuated by malice in law. But, if the action is guided by extraneous consideration and the true object is for different reasons from the one for which the acquisition is allegedly made, then the appellants may have a case that the State is actuated by motives and intentions which are *mala fide*. In this case, in the counter-affidavit the State has denied the allegation that they were politically actuated. There appears to be no *prima facie* evidence that the Government was influenced by considerations which are bad. We are, therefore, of the view that the appellants

have not proved *mala fides* on the part of the Government in starting proceedings for acquisition of the superstructures..

6. The only question that remains to be considered is whether the acquisition can be upheld as one for public purpose. It has already been pointed out that under the impugned notification, the public purpose is said to be "to provide for shopping facilities to samll traders and self-employed persons." According to the appellants, the tenants are not small traders, nor are they self-employed persons, but most of them are income-tax assessees, some of them are doctors, jewellers, pawnbrokers and pharmacists. The further contention is that some of them have ceased to be tenants even before the notification, that the appellants have taken proceedings both under the Rent Control Act and in the civil court and have also obtained orders of eviction and also decrees for possession, that there are only 32 tenants and that the acquisition for providing shopping facilities to the defaulting tenants of the appellants' premises will not be 'public purpose'. The fact that the tenants of the appellants' premises formed the Royapuram Cemetery Road Merchants' Sangam is not disputed. As to what constitutes public public purpose, has been the subject-matter of many rulings, the earliest of which is *Hamabai Framjee Petit v. Secretary of State*, (1915) L.R.42 I.A.44= 28 M.L.J.179= 2 L.W.191= A.I.R.1914 P.C.20 where their Lordships of the Judicial Committee, following Batchelor, J. took the view that the phrase "public purpose" must include a purpose in which the general interest of the community as opposed to particular interest of individuals, is directly vitally concerned. The expression "public purpose" came to be considered in *Somawanti v. State of Punjab*, (1963)2 S.C.J.35= (1963)2 M.L.J. (S.C.)18= (1963)2 An.W.R. (S.C)18= (1963)2 S.C.R.774= A.I.R.1963 S.C.151. Referring to the definition in section 3(f) of the Land Acquisition Act, their Lordships pointed out that it is an inclusive definition and not a compendious one and therefore does not assist very much in ascertaining the ambit of the expression "public purpose" and that broadly speaking the expression "public purpose" would however include a purpose in which the general interest of the community as opposed to particular interest of individuals is directly and vitally concerned. In this case, the acquisition, is sought to be made to accommodate the tenants of the premises belonging to the appellants. The learned Advocate-general sought to sustain the order of the learned single Judge on the ground that the tenants of the premises of the appellants also form a section of the society and therefore the purpose in question will be a public purpose and the Government alone is the best authority to determine whether the purpose in question is "public purpose" or not. In our view, the proper approach would be to consider the scheme as a whole and then examine whether the entire scheme is for a public purpose or not. As we earlier pointed out, it is only to benefit the tenants who have defaulted to pay rents against some of whom the appellants have procured orders of eviction and decrees for possession. This is not a case of landless poor being provided with shelter, but accommodating the very tenants of the appellants who have defaulted. As pointed out already, some of the tenants are pawnbrokers, doctors, chemists and others. All the disgruntled tenants joined together under the banner of Royapuram Cemetery Road Merchants' Sangam and moved the Government for cancelling the lease granted to the appellants and acquire the superstructures, by which acquisition the persons to be benefited will be the tenants of the appellants. In *Arnold Rodricks v. State of Maharashtra*, (1966)3 S.C.R.885= A.I.R.1966 S.C.1788 the Supreme Court observed thus:

> "The main idea in issuing the impugned notifications was not to think of the private comfort or advantage of the members of the public but the general public good. At any rate where a very large section of the community is concerned its welfare is a matter of public concern, and when the notifications serve to enhance the welfare of this section of the community this is public purpose and the notifications are valid and cannot be impugned on the ground that they were not issued for any public purpose."

In this case, it cannot be said that the welfare of the large section of the community is concerned. We have not been shown any precedent or incident where the Government have acquired buildings for accommodating the tenants of these buildings. The acquisition is meant for the particular interest of the individual tenants of the appellants and therefore, in our view, does not involve the general interest of the community as a whole. In our view, the acquisition is therefore not for a public purpose.

7. We therefore, allow the appeals, set aside the order of the learned single Judge passed in Writ Petitions Nos.1835 to 1837 of 1982 and quash the notification made in G.O.Ms.No.68, Revenue, dated 11.1.1982 and published in the Tamil Nadu Government Gazette, Extraordinary, Part II, Section 2, dated 12.1.1982 and the notification made in G.O.Ms.No.2753, Revenue, dated 15.12.1980, published in the Tamil Nadu Government Gazette, (Supplement) dated 31.12.1980. There will, however, be no order as to costs.

B.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.4748 of 1982. *17th July*, 1985.

Jivaraj Motilal *Petitioner**

v.

Marthaka Plastic Industries and others *Respondents.*

(A) Civil Procedure Code (V of 1908), Order 37, rules 1 and 2 - Suit filed under Order 37, Civil Procedure Code - Service of summons in Form 4-A, Appendix B as prescribed not effected - Defendant entered appearance through counsel before service of summons - Ex parte decree passed - Petition to set aside allowed - Held, mandatory provisions of Order 37, rules 2 and 3 not complied with.

(B) Limitation Act, 1963 (36 of 1963), Articles 118, 123 and 137 (last column) - Scope and applicability - Limitation for setting aside ex parte decree in suits filed under Order 37, Civil Procedure Code.

(C) Practice - Suit filed under Order 37 - Defendant filing vakalat and memo of appearance before service of summons - Effect of.

Held:- Though ordinarily, Counsel entered appearance only after service of summons, yet, in this case, such appearance had been entered even prior to the service of summons. In other words, even before the stage contemplated by Order 37, rule 3(1), Civil Procedure Code had been completed, the defendants in the suit had entered appearance through counsel to the knowledge of the petitioner and the vakalat had contained an address for service of notice on the respondents, under Order 37, rule 3(2), Civil Procedure Code. If the notice required had been left at the address of the counsel given in the vakalat, that would be sufficient. No doubt Order 37, rule 3(3), Civil Procedure Code contemplates notice of appearance being

given by the defendant to the plaintiff's pleader on the day when the defendant enters appearance. But on the facts and circumstances of this case, it appears that that was not necessary because the vakalat on behalf of the respondents had been filed in the suit itself to the knowledge of the petitioner as well as his Counsel and an address for service had also been indicated in the vakalat filed by the respondents and that would be more than sufficient notice of appearance by the defendants. Therefore it can be taken that the respondents had entered appearance even prior to the expiry of ten days of the service of summons and had also given notice of appearance to the petitioner. Even so, there had been a failure on the part of the petitioner to take further steps prescribed under Order 37, rule 3(4), Civil Procedure Code. It is also not in dispute that the other requirements of Order 37, rule 3(4), Civil Procedure Code were not complied with. Only upon compliance with the requirements of Order 37, rule 3(4), Civil Procedure Code and the service of summons for judgment, the defendant can make the application for leave to defend the suit as provided under Article 118 of the Limitation Act, 1963, which may either be granted or not granted and other consequences referable to the same would follow only thereafter. Therefore in this case, there has been a non-compliance with Order 37, rule 3(4), Civil Procedure Code by the petitioner and the petitioner cannot take advantage of his own default and claim that the decree passed as a consequence thereof should be maintained.
[Para.7]

In this case it has been found that there had been no service of summons in Form 4-A in Appendix B as envisaged by Order 37, rule 3(4), Civil Procedure Code and in such a situation it has to be held that the respondents could not have applied for leave to defend within the time prescribed under Article 118 of the Limitation Act, 1963, and that they became aware of the passing of the decree only on 25th September, 1979 and the application had been filed on 8th October, 1979 well within the time prescribed by the last column of Article 123 with reference to cases where summons is not duly served. Even applying Article 137 the application had been filed well within the time prescribed thereunder. Looked at from any point of view there had been no delay at all in the filing of the application to set aside the *ex parte* decree and even if there was any that had been satisfactorily explained, as it is not the case of the petitioner that the respondents had knowledge of the passing of the decree earlier to the date mentioned by them. Under these circumstances the order of the Courts below condoning the delay and also setting aside the *ex parte* decree cannot be assailed at all on the ground that it is vitiated by illegalities and irregularities.
[Para.8]

M. Srinivasan, for Petitioner.

The Court made the following

ORDER:- The plaintiff in O.S.No.2440 of 1979, II Assistant City Civil Court, Madras is the petitioner in this civil revision. In that suit filed on 21st March, 1979 under the provisions of Order 37, C.P.C. the petitioner had prayed for a decree against the respondents herein for the recovery of a sum of Rs.25,160 with interest and costs stated to be due on three promissory notes, dated 20th August, 1975, 4th November, 1975 and 9th March, 1976 respectively. Along with the plaint, the petitioner had also filed I.A.No.5947 of 1979 praying for an order of attachment before judgment over the house and the ground bearing door No.3, Krishna Iyer St., George Town, Madras-1. On that application, on 3rd April, 1979, notice calling upon the respondents to furnish security returnable by 19th April, 1979, was ordered. On 12th April, 1979, counsel undertook to appear and on 17th April, 1979, a vakalat on behalf of the respondents (defendants) was filed in the suit. Subsequently, on 19th April, 1979, a counter was filed on behalf of the respondents and on the next day, an affidavit of undertaking was also filed by the respondents, on the basis of which the court recorded the undertaking and closed the application for attachment before judgment. The suit was posted to 12th July, 1979 and it was then realised that though vakalat in the suit had been filed

on 17th April, 1979, notice of appearance had not been given and thereupon the suit was posted to 14th August, 1979. On that day also, it was represented on behalf of the petitioner that notice of appearance had not been served and since the respondents as well as their counsel were absent, a decree was passed in the suit as prayed for with costs on 14th August, 1979. In I.A.No.4281 of 1982 filed under Order 37, rule 3(7), C.P.C. and I.A.No.17646 of 1979 preferred under Order 37, rule 4, C.P.C. the respondents prayed that the delay of 24 days in seeking to set aside the decree should be condoned and the decree passed against them on 14th August, 1979 should be set aside. In the affidavit filed in support of these applications, the respondents stated that vakalat on their behalf had been filed only in the proceedings for the attachment before judgment and not in the suit and that they had not been served with summons as well as the copy of the plaint and since they did not hear anything from the court, they contacted their counsel on 25th September, 1979 when they learnt that the suit had been decreed on 14th August, 1979. According to the respondents, the passing of a decree without taking the first step, namely, the service of summons, was invalid, and rendered the decree liable to be set aside. Adverting to the delay in filing the application for setting aside the *ex parte* decree, the respondents maintained that there was no delay at all as they became aware of the passing of the decree only on 25th September, 1979 and that the application for the condonation of the delay was filed only by way of abundant caution.

2. In the counter filed by the petitioner, after referring to the application for attachment before judgment and the closure of the same on 20th April, 1979, he stated that the respondents had received on 16th April, 1979 a copy of the plaint as well as the notice of the first hearing of the suit on 12th July, 1979, and since thereafter the respondents failed to observe and fulfil the provisions of Order 37, C.P.C. the suit was decreed. The petitioner also maintained that at all material times the respondents were fully aware of the suit and time was granted to the respondents even on 12th July, 1979 to give notice of appearance to the petitioner and the suit was adjourned to 14th August, 1979, for this purpose and, therefore, the respondents cannot claim that they were not aware of the proceedings. The petitioner also stated that the reasons set out for the condonation of the delay are not correct and had been given only with a view to protract the proceedings and delay the realisation of the amount due under the decree and, therefore, no ground has been made out for condoning the delay. In a supplemental counter affidavit filed by the petitioner, he brought to the notice of the court how after the suit was decreed on 14th August, 1979, proceedings in execution were taken in E.P.No.2529 of 1980 and the respondents were served with sale notice for the sale of the property on 3rd February, 1982. The petitioner also referred to a breach of the undertaking given by the respondents to court not to sell or dispose of the property bearing door No.3, Krishna Iyer St., George Town, Madras-1, by the sale thereof on 27th June, 1981 under document No.429 of 1981, and reiterated the stand taken by him earlier regarding the validity of the decree and also the delay.

3. The learned II Assistant Judge, City Civil Court, Madras, found that though the respondents had entered appearance through counsel and filed a vakalat on 17th April, 1979, there had been no service of summons on the respondents with a copy of the plaint and in the absence of such service of summons in Form 4 as prescribed in Appendix B, the first of a series of successive steps had not been complied with and, therefore, there was no scope for other steps following the first step being fulfilled and thus the decree in the suit had been passed without complying with the mandatory provisions of Order 37, rules 2 and 3, C.P.C. rendering the decree liable to be set aside. It was also found that when the decree is liable to be set aside, it followed automatically that the delay in seeking to set aside the decree is also liable to be condoned. In that view, the learned II Assistant Judge, City Civil Court, Madras, allowed I.A.No.4281 of 1982 and 17646 of 1979 and set aside the decree

passed on 14th August, 1979 in the suit.

4. In this revision directed against that order, the principal question that arises for consideration is, whether the court below was right in the view it took regarding the decree passed and also in setting it aside. The learned counsel for the petitioner strongly relied upon the filing of the vakalat in the suit on behalf of the respondents on 17th April, 1979 and contended that the respondents had entered appearance, but had not given notice of such appearance, and therefore, the further steps had been taken culminating in the passing of the decree on 14th August, 1979 and no exception could, therefore, be taken to the decree passed in favour of the petitioner on 14th August, 1979, nor could it be set aside as had been done by the court below.

5. Order 37, C.P.C. prescribes a strict and stringent procedure with reference to the particular class of suits to which those provisions are to be applied. The pivotal provisions of the stringent procedure so prescribed are to be found in Order 37, rules 2 and 3, C.P.C. Under Order 37, rule 2(1), C.P.C. a suit under the summary procedure may be instituted by presenting a plaint containing a specific averment to the effect that the suit is filed under Order 37, C.P.C. and that no relief falling outside the ambit of the Rule had been claimed in the plaint with the inscription in the cause title that the suit is filed under Order 37, C.P.C. Order 37, rule 2(2), C.P.C. states that the summons shall be in Form 4 in Appendix B. A reference to the same shows that it is a summons to cause an appearance to be entered for the defendant within ten days from the service thereof, in default of which the plaintiff will be entitled, on the expiry of a period of ten days, to obtain a decree for a sum not exceeding the sum mentioned therein. The summons further provides that if the defendant or defendants enter appearance, then a further summons for judgment will be served at the hearing of which, the defendant or defendants would be entitled to move the court for leave to defend the suit. The summons further proceeds to state that leave to defend the suit may be obtained if the court is satisfied that there is a defence to the suit on the merits. Under Order 37, rule 2(3), C.P.C. the defendant shall not defend the suit unless he enters appearance. Further if there is default in his entering appearance then, the plaint allegations shall be deemed to be admitted and the plaintiff shall be entitled to a decree for a sum not exceeding that mentioned in the summons together with interest and such other sums, and such a decree may be executed forthwith. A careful reading of Order 36, rule 2(1) to (3), C.P.C. in the light of the prescribed form of summons shows that unless the defendant or defendants enter appearance within ten days of the service of summons, the other consequences mentioned under Order 37, rule 2(3), C.P.C. would follow.

6. It is now necessary to refer to Order 37, rule 3, C.P.C. Under Order 37, rule 3(1), C.P.C. the plaintiff is obliged to serve on the defendant together with the summons in Form 4 under Order 37, rule 2(2), C.P.C. a copy of the plaint and other annexures and thereafter the defendant, within ten days of such service, has to enter an appearance either in person or by pleader and, in either case, an address for service or notice on him shall be filed by him in court. Sub-clause (2) of Order 37, rule 3, C.P.C. declares that if all summonses and notices are left at the address given by the defendant or defendants for service, that would be due service. Order 37, rule 3(3), C.P.C. requires the defendant or defendants to give notice of appearance to the plaintiff's pleader or to the plaintiff, if he appears in person, on the day of entering the appearance, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff as the case may be. When the defendant enters appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form 4-A in Appendix B returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed, and stating that in his behalf there is no defence to the suit and thereafter the defendant may,

at any time within ten days from the service of such summons for judgment, apply on such summons for leave to defend such suit disclosing such facts as may be deemed sufficient to entitle him to defend, and the court may grant leave to defend either unconditionally or upon such terms as may appear to the court to be just. The proviso to sub-clause (5) of Order 37, rule 3, C.P.C. states that leave to defend should not be refused unless the court is satisfied that the facts disclosed do not indicate a substantial defence to be raised or that the defence intended to be raised is frivolous or vexatious. The second proviso therein states that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit should not be granted, unless the admitted amount is deposited. Under sub-clause (6)(a) of Order 37, rule 3, C.P.C. at the hearing of the summons for judgment, if the defendant does not apply for leave or if such an application is made and is refused, the plaintiff shall be entitled to judgment forthwith. Under sub-clause (6)(b) of Order 37, rule 3, C.P.C. where the defendant is permitted to defend the whole or any part of the claim, the court may direct him to furnish security within such time as may be fixed by the court and in the event of a failure to furnish security within the time so prescribed by the court or to carry out such other directions as may have been given by the court, the plaintiff shall be entitled to judgment forthwith. Order 37, rule 3(7), C.P.C. clothes the Court with power to excuse the delay in entering an appearance or in applying for leave to defend the suit by the defendant for a sufficient cause shown. A careful consideration of these two vital provisions establish that a defendant is not entitled to defend unless he enters appearance and in default of appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff will be entitled to a decree. When, however, the defendant enters appearance in response to the service of summons in Form 4 in Appendix B under Order 37, rule 2(1), C.P.C. he has to do so within ten days of such service and he is obliged to file an address for service of notice on him, on that day, he has also to give notice of appearance to the plaintiff or his counsel. After the defendant enters appearance under Order 37, rule 2, C.P.C. a summons for judgment in Form 4-A in Appendix B has to be served by the plaintiff on the defendant not less than ten days from the date of service supported by an affidavit verifying the particulars or cause of action and the amount of claim and setting out the belief of the plaintiff that the defendant has no defence to the suit and within ten days from the service of such summons for judgment, the defendant may, by affidavit or otherwise, disclose such facts as may be deemed sufficient to entitle him to raise a defence and apply for leave to defend the suit and thereafter the court may grant leave either unconditionally or upon such terms as may appear to the court to be just. If a part of the amount claimed is admitted by the defendant to be due from him, leave to defend should not be granted unless the admitted amount is deposited. If, at the hearing of such summons for judgment, the defendant does not apply for leave to defend or if such an application has been made and refused, the plaintiff will be entitled to judgment forthwith. If the defendant is permitted to defend either the whole or any part of the claim, the court may direct him to furnish security within such time as the court may fix and on failure to fulfil such a direction, the plaintiff will be emitled to judgment forthwith. This broadly is the scheme of the strict and stringent provision of Order 37, rules 2 and 3, C.P.C. intended to minimise the duration of suits instituted under the special procedure. In this case, the summons as envisaged under Order 37, rule 2(2), C.P.C. had not been served on the respondents in the manner contemplated under Order 37, rule 3(1), C.P.C. No doubt, the petitioner asserted that a copy of the plaint had been taken by the counsel for the respondents on 16th April, 1979. That had not been established at all. There is, therefore, no compliance with the procedure indicated under Order 37, rule 3(1), C.P.C.

7. Whether the filing of a vakalat on

17th April, 1979 on behalf of the respondents would make any difference has next to be considered. Here again, it is difficult to accept the stand taken by the respondents to the effect that the vakalat had been filed only in the proceedings taken out by the petitioner for securing an order of attachment before judgment, for, it is seen from a reference to the vakalat that it had been filed in the main suit and not only in the interlocutory application for an order of attachment before judgment. The vakalat has not been merely put into the court. Earlier, the filing of the application by the petitioner for securing an order of attachment before judgment has been referred to. It is in response to a notice served in that application, on 12th April, 1979, counsel undertook to appear on behalf of the respondents and finally filed the vakalat in the suit on behalf of the respondents on 17th April, 1979 and thereafter a counter as well as an affidavit of undertaking had been filed on behalf of the respondents by the same counsel and on 20th April, 1979 after recording the undertaking, the application for attachment before judgment was closed. Though, ordinarily, counsel enter appearance only after service of summons, yet in this case, such appearance had been entered even prior to the service of summons. In other words, even before the stage contemplated, the defendants in the suit had entered appearance through counsel to the knowledge of the petitioner and the vakalat had contained an address for service of notice on the respondents. Under Order 37, rule 3(2), C.P.C. if the notice required to be served on the respondents had been left at the address of the counsel given in the vakalat, that would be sufficient. No doubt, Order 37, rule 3(3), C.P.C. contemplates notice of appearance being given by the defendant to the plaintiff's pleader on the day when the defendant enters appearance. But, on the facts and circumstances of this case, it appears to me that was not necessary because the vakalat on behalf of the respondents had been filed in the suit itself to the knowledge of the petitioner as well as his counsel and an address for service had also been indicated in the vakalat filed by the respondents and that would be more than sufficient notice of appearance by the defendants. Therefore, it can be taken that the respondents had entered appearance even prior to the expiry of ten days of the service of summons and had also given notice of appearance to the petitioner. Even so, there has been a failure on the part of the petitioner to take the further steps prescribed under Order 37, rule 3(4), C.P.C. There is no dispute that after the respondents entered appearance through counsel on 17th April, 1979 there had been no service on them of a summons for judgment in Form 4-A in Appendix B. It is also not in dispute that the other requirements of Order 37, rule 3(4), C.P.C. were not complied with. Only upon compliance with the requirements of Order 37, rule 3(4), C.P.C. and the service of summons for judgment, defendant can make an application for leave to defend the suit as provided under Article 118 of the Limitation Act, 1963 which may either be granted or not granted and the other consequences referable to the same would follow only thereafter. Therefore, in this case, there has been a non-compliance with Order 37, rule 3(4), C.P.C. by the petitioner and the petitioner cannot take advantage of his own default and claim that the decree passed as a consequence thereof should be maintained. Thus even construing the filing of the vakalat on behalf of the respondents on 17th April, 1979 which contained the name of the counsel as well as an address for service to the knowledge of the counsel for the petitioner as sufficient compliance with Order 37, rule 3(1) and (3), C.P.C. there has been a non-compliance with Order 37, rule 3(4), C.P.C. and it is only on account of this that the respondents had not been able to apply for and obtain leave and that had resulted in a decree being passed against the respondents under Order 37, rule 6(a), C.P.C. Thus, on a careful consideration of the relevant provisions in the light of the facts in this case, it is clear that there has been substantial violation of the provisions of Order 37, rule 3(4), C.P.C. and that has resulted in the passing of the decree against the respondents without their having been given an opportunity to apply for leave to defend the suit and, therefore, the decree passed against them

suffered from this procedural irregularity and deserved to be set aside. The court below was, therefore, quite right in having set aside the decree passed against the respondents.

8. The learned counsel for the petitioner next submitted that there had been no consideration at all by the court below of the question of delay and that the court had mechanically and automatically proceeded to condone the delay on the ground that when the decree is liable to be set aside, the delay also should be condoned. No doubt, the learned counsel for the petitioner is, to some extent, justified in this criticism of the approach made by the court below on the question of delay. However, on a consideration of the merits, there does not appear to be any substance in the objection raised by the petitioner. It is seen from paragraph 5 of the affidavit filed on behalf of the respondents in support of these applications that they contacted their counsel on 25th September, 1979 and that they became aware that day that the suit had been decreed on 14th August, 1979. Again, in paragraph 8, the respondents stated that there had been no delay at all as they came to know of the passing of the decree only on 25th September, 1979. In answer to this, the petitioner has not stated anywhere in the counter-affidavit that the respondents became aware of the passing of the decree in the suit earlier to 25th September, 1979. Even in the supplemental counter-affidavit filed by the petitioner, the petitioner has not stated anything to show that the respondents were aware of the passing of the decree even prior to 25th September, 1979 and, therefore, the delay ought not to be condoned at all. Earlier, it had been found that there had been no service of summons in Form 4-A in Appendix B as envisaged by Order 37, rule 3(4), C.P.C. and in such a situation, it has to be held that the respondents could not have applied for leave to defend within the time prescribed under Article 118 of the Limitation Act, 1963, and that they became aware of the passing of the decree only on 25th September, 1979 and the application had been filed on 8th October, 1979 well within the time prescribed by the last column of Article 123 of the Limitation Act, 1963, with reference to cases where summons is not duly served. Even applying Article 137 of the Limitation Act, 1963, the application had been filed within the time prescribed thereunder. Looked at from any point of view, there has been no delay at all in the filing of the application to set aside the *ex parte* decree and even if there was any, that had been satisfactorily explained, as it is not the case of the petitioner that the respondents had knowledge of the passing of the decree earlier to the date mentioned by them. Under those circumstances, the order of the court below condoning the delay and also setting aside the *ex parte* decree cannot be assailed at all on the ground that it is vitiated by illegalities and irregularities. The civil revision petition is, therefore, dismissed. There will be, however, no order as to costs.

9. In the course of the hearing of the civil revision petition, the learned counsel for the petitioner brought to the notice of the court that the respondents, contrary to the undertaking given by them in the application for attachment before judgment filed by the petitioner, have disposed of the house on 27th June, 1981 under document No.429 of 1981. It is made clear that the respondents were ill-advised in so disposing of the property contrary to the undertaking given by them to the court and that the undertaking given earlier by the respondents to court would continue to operate till the further proceedings in the suit inclusive of the execution proceedings come to a close.

R.S. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J.*

*C.R.P.No.2335 of 1983. 25*th April*, 1985.

K. Ramraj *Petitioner**

v.

Narasimha Dass Gounder *Respondent.*

(A) Negotiable Instruments Act, 1881 (26 of 1881), section 87 - Material alteration, what is - Alteration of the date of the instrument amounts to material alteration - Alteration with consent of the party will not vitiate the negotiable instrument.

(B) Negotiable Instruments Act, 1881 (26 of 1881), section 118-B - Presumption under - Alteration of the date of instrument will amount to material alteration.

Section 87 of the Negotiable Instruments Act deals with alterations which have come to be made or effected after the negotiable instrument was made and executed and without the consent of the party sought to be made liable thereunder. If an alteration was made or effected even before the execution of the negotiable instrument and the party who subscribes his signature thereto is aware of that condition of the instrument and signs it without any protest thereto and thereby consenting to the alteration made being there, he cannot turn round subsequently to make a grievance that there has been an alteration of the negotiable instrument and avoid his liability thereunder. There could also be a case where, after the instrument was made and executed, with the consent of the party concerned, the negotiable instrument was altered. Even in such a case the alteration will not vitiate the negotiable instrument. *[Para.4]*

Section 118 of the Act states that until the contrary is proved, the presumption is that every negotiable instrument bearing a date was made or drawn on such date. This is the general presumption. But when an alteration is apparent on the face of the instrument, the onus is on the plaintiff to explain it and show as to how the alteration was made. *[Para.6]*

There can be no doubt that alteration of the date would amount to a material alteration. The date is an important part of the instrument, because, it fixes the period of limitation within which the defendant could be sued. Hence where the date of the instrument is altered subsequently so as to enable the making of the claim on the basis of the altered instrument, within the extended period it would amount to material alteration and make the instrument void. *[Para.8]*

Cases referred to:-

Subba Reddi v. Neela Pareddi, (1936)1 An.W.R.141; A.I.R.1966 A.P.267; *Subbi Reddy, In re*, A.I.R.1936 Mad.154; *Massamut Khoob Connur v. Badoo Moondnarain Singh*, (1861-64)9 M.I.A.1, *Subramania Pattar v. Porathana Andi*, (1942)2 M.L.J.303; I.L.R. (1943) Mad.143: A.I.R.1942 Mad.709 (2). 55 L.W.554; *V.Kondiah v. C.P.Pulliah*, A.I.R.1960 A.P.121, *Govindaswami v. Kuppuswami*, I.L.R. (1889) 12 Mad.239.

P.Arunagirinathan. for Petitioner.

R.T.Doraiswami, for Petitioner.

The Court made the following

ORDER:- The defendant in O.S.No.384 of 1977 on the file of the Additional District Munsif, Coimbatore, is the petitioner in this revision. The respondent is the plaintiff. The plaintiff laid the suit for recovery of amount due under a promissory note bearing the date 20th April, 1974. The suit on the promissory note had come to be laid on 14th April, 1977. The defendant contested the suit mainly putting forth two contentions. One is that there is material alteration of the date of the suit promissory note which was executed only on 20th March, 1974, and not on 20th April, 1974, and the other is that he is entitled to the benefits of Tamil Nadu Act 31 of 1976 and Tamil Nadu Act 40 of 1978. The parties placed

their evidence, oral and documentary and that was the subject-matter of assessment by the first court and it countenanced the pleas of the defendant that there was material alteration of the suit promissory note and in any event the defendant is entitled to the benefits of only Tamil Nadu Act 31 of 1976 and not the other Act. As a result, the suit was dismissed, but without costs. The plaintiff appealed and the appellate court opined the other way about it and it rejected the aforesaid pleas of the defendant and granted a decree in favour of the plaintiff. The judgment and decree of the appellate Court are being put in issue in this revision.

2. Mr. R.Arunagirinathan, learned counsel for the defendant, petitioner herein would submit that the plaintiff, examined as P.W.1, had admitted that the month originally written in the suit promissory note was erased and the month 'April' was written and so also, on the Revenue stamps the month '3' was corrected as '4'. On this basis, the learned counsel submits that when once it has become evident that the suit promissory note suffers an alteration in respect of the date, which is a material alteration, the plaintiff must explain as to when and how this alteration was made and, in the absence of such explanation, the suit promissory note must be deemed to have suffered a material alteration under section 87 of the Negotiable Instruments Act, 1881, hereinafter referred to as the Act. For this submission, learned counsel places reliance on the judgment of Gopal Rao Ekbote, J. in *Subba Reddi v. Neela Pareddi*, (1966)1 An.W.R. 141= A.I.R.1966 A.P.267. Further, learned counsel would submit that on the question of the defendant being entitled to the benefits of Tamil Nadu Act 31 of 1976, the appellate court has not properly assessed the evidence placed in the matter and has wrongly cast the onus of proof on the defendant.

3. As against the above submission made by the learned counsel for the defendant, Mr.R.T.Doraiswami, learned counsel appearing for the plaintiff, respondent herein, would submit that no suggestion was put to the plaintiff, examined as P.W.1, that the alteration was made after the execution of the suit promissory note and the defendant did not even care to reply to the suit notice issued as per Ex.A-2 and in the said circumstances, as per section 118(b) of the Act, the suit promissory note must be presumed to have been executed on the date which it bears.

4. Section 87 of the Act states that any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. Alteration presupposes a particular condition of the instrument which prevailed anterior to the alteration. Section 87 deals with alterations which have come to be made or effected after the negotiable instrument was amde and executed and without the consent of the party sought to be made liable thereunder. If an alteration was made or effected even before the execution of the negotiable instrument and the party who subscribes his signature thereto is aware of that condition of the instrument and signs it without any protest thereto and thereby consenting to the alteration being there, he cannot turn round subsequently to make a grievance that there has been an alteration of the negotiable instrument and avoid his liability thereunder. There could also be a case where, after the instrument was made and executed, with the consent of the party concerned, the negotiable instrument was altered. Even in such a case the alteration will not vitiate the negotiable instrument.

5. In *Subba Reddi, In re*, A.I.R.1936 Mad.154 it has been countenanced that section 87 of the Act only contemplates an alteration subsequent to the execution of the note and further the alteration must have been made without the consent of the party who was sought to be made liable. In the present case, while the plaintiff was examined as P.W.1, it has been simply elicited that the month originally written in the suit promissory note was erased and the month 'April' was written and so also the month '3' was corrected as '4'. It was not suggested to him that these alterations were made

after the suit promissory note was executed and without the consent of the defendant. The defendant, examined as D.W.1, also did not specifically depose that these alterations were not there at the time when the suit promissory note was executed and they were brought in only subsequently.

6. Section 118(b) of the Act states that until the contrary is proved, the presumption is that every negotiable instrument bearing a date was made or drawn on such date. This is the general presumption. But, when an alteration is apparent on the face of the instrument, the onus is on the plaintiff to explain it and show as to when and how the alteration came to be made. In *Mussamut Khoob Connur v. Badoo Moondnarain Singh*, (1861-64) 9 M.I.A.1 it was observed as follows.

> "... It may be conceded that, in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document.
>
> But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And, such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document..." Pages 17-18

Chandrasekhara Aiyar, J. in *Subramania Pattar v. Porathana Andi*, (1942) 55 L.W.554= (1942)2 M.L.J.303= I.L.R. (1943) Mad.143= A.I.R.1942 Mad.709(2), took note of the principle as follows:

> "As the alteration is apparent on the face of the document the onus is on the plaintiff to explain it and to show that it is not a material alteration which renders the instrument void and unenforceable."

7. In *V.Kondiah v. C.P.Pulliah*, A.I.R.1960 A.P.121, S.Qamar Hassan, J. also took note of the principle:

> "...that where a party sues on an instrument which on the face of it appears to have been altered, it is for him to show that the alteration had not been improperly made." Page.122.

To similar effect is the decision of Gopal Rao Ekbote, J. in *Subba Reddi v. Neelappa-reddi*, (1966)1 An.W.R.141= A.I.R.1966 A.P. 267.

8. There can be no doubt that alteration of the date would amount to a material alteration. The date is an important part of the instrument, because it fixes the period of limitation within which the defendant could be sued. Hence, where the date of the instrument is altered subsequently, so as to enable the making of the claim on the basis of the altered instrument within the extended period, it would amount to material alteration and make the instrument void. In *Govinda-sami v. Kuppusami*, I.L.R. (1889)12 Madras 239 the date of an instrument was changed from 11th to 25th September and it was held that such a change was a material alteration, because it materially affected the liability of the defendant by granting time to the plaintiff to file an action against the defendant even though the suit was actually filed within the period of limitation as counted from the 11th September.

9. In the present case, both the counsel admit that the concentration in the courts below on this aspect was not from the proper legal angle at all and evidence was placed at a tangent and they express a grievance that the evidence placed is inadequate either way. I find that the defendant, examined as D.W.1, has also not asserted that the alteration was not there at the time of the execution of the suit promissory note. The evidence of the plaintiff, examined as P.W.1, has been frank. He did not try to give a camouflaged evidence with regard to the factum of the alterations. But, it was not suggested to him that the alterations were made subsequent to the execution

of the suit promissory note. If in fact the month in the suit promissory note was altered after it was executed and without the consent of the defendant, it will stand vitiated. But, unfortunately, this crucial aspect has not come out in evidence. The appellate court has mostly acted on presumptions. The appellate Court has omitted to take note of the fact that the plaintiff, examined as P.W.1 has admitted that there is an alteration even in the body of the suit promissory note. The appellate Court observes that in the writings found in the suit promissory note it has been specifically narrated that the promissory note was executed by the defendant for valuable consideration of Rs.2,000 on 20th April, 1974. This observation exposes the lack of due advertence to the evidence already on record which indicates that there is alteration even in the body of the suit promissory note with regard to the month as admitted by the plaintiff, examined as P.W.1. But, it is not possible to straightway conclude that the alteration was not there even at or before the time of execution of the suit promissory note and it may be that the alteration was there even earlier and the defendant was aware of the same and signed it only in such a condition. It is only in this regard I find that the evidence is inadequate and inchoate. Conscious of this lacuna in the evidence in this regard on either side, both the counsel make a request that in case this Court should be inclined to remit the matter back, the parties should be given due chance to place further evidence. In my view, in the interest of justice, as well as in the interest of the parties, the matter requires fresh examination by the appellate Court, after the parties place further evidence on this question.

10. On the question as to whether the defendant is entitled to the benefits of Tamil Nadu Act 31 of 1976, the appellate Court has taken the *ipse dixit* of the plaintiff, examined as P.W.1, that the defendant owns a house and is not an agriculturist. The appellate Court has not adverted to any other factual aspect on this question. That could not be the proper way of assessing and adjudicating the question. Mr.R. Arunagirinathan, learned Counsel for the defendant submits that here again the evidence placed by the parties is insufficient and the parties deserve permission to place further evidence on this question also. This submission is being supported by Mr.R.T.Doraiswami, learned counsel for the plaintiff, and both the counsel pray for an opportunity to place further evidence on this aspect also.

11. For the reasons expressed above, I am constrained to allow this appeal and I do allow this appeal, set aside the judgment and decree of the appellate court and remit the matter back to the appellate court for fresh consideration, keeping in mind the principles deducible under sections 87 and 118(b) of the Act and taking note of the judicial pronouncements exemplifying the said principles and adjudicate the question as to whether the suit promissory note suffers a material alteration with regard to the date as contended by the defendant. The appellate Court will also advert to the question whether the defendant will be entitled to the benefits of Tamil Nadu Act 31 of 1976 and give a fresh decision thereon. The appellate Court will permit the parties to place further evidence as they may deem it necessary on both the questions. The parties are directed to bear their respective costs up to this stage. Further costs will depend upon the result before the appellate court.

12. The suit is of the year 1977 and the appellate Court will dispose of the matter within a period of three months from the date of receipt of a copy of this order, along with the records, from this Court.

R.S. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and M.A. Sathar Sayeed, JJ.*

*Writ Appeal No.519 of 1978.

10th April, 1985.

M/s. Conveyor Equipment Company (P) Limited *Appellant**

v.

The Union of India and another *Respondents.*

(A) Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), section 16(1)(h) - Old establishment closed - Land, building and machinery alone leased out to new establishment - Held that the new establishment was entitled to benefits under the section.

(B) Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), section 16(1)(h) - Interval between the closure of establishment by the previous owner and restarting of business by purchaser - Not a deciding factor in considering whether there was a continuance of establishment.

The partnership firm Messrs. Veekay Engineering Industries, the previous owner, had closed a part of the establishment and after such closure, a lease of the land, building and machinery was given to the new establishment M/s. Conveyor Equipment Co., There was a complete stoppage of work as a result of the closure of the old establishment and all the previous employees had been discharged on payment of due closure compensation. The new establishment started the same business as a new concern. Thus, the facts established indicated that there had been a closure of the old establishment run by Messrs. Veekay Engineering Industries and the setting up or starting of a new establishment. The lease was only in respect of land, building and machinery and it was not of the establishment as such, that is, of the industry as a going concern. It was no doubt true that if the business as such is transferred by way of lease, then it can be postulated that it is only a change of management and not of ownership and that a mere change of management will nor give rise to starting of a new business. But in this case, the lease could not have been of the industry or establishment as such as a going concern. In this view of the matter, the new establishment will be entitled to the benefit of the non-applicability of the Act under section 16(1)(b). *[Para.8]*

The interval between the closure of an establishment by the previous owner and the restarting of the business by the purchaser will not be a deciding factor in considering the question as to whether there has been continuance of an establishment or not. Once there is a closure of the old establishment, whatever may be the internal of time between the closure of business by the previous owner and the restarting of the business by another management it must be taken that the establishment started was a new one and that it is not a continuance of the old establishment. *[Para.6]*

The Provident Fund Inspector v. The Secretary, N.S.S., Co-operative Society, (1970)2 S.C.R.481. (1971) Lab.I.C.18. (1969) K.L.T. 703: (1970) L.W. (Crl.) 171: A.I.R.1971 S.C.82 followed. *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner,* A.I.R.1985 S.C.323, distinguished.

Cases referred to:

The Provident Fund Inspector v. The Secretary, N.S.S., Co-operative Society, (1970)2 S.C.R.481: (1971) Lab.I.C.18: (1969) K.L.T. 703: (1970) L.W. (Crl.) 171. A.I.R.1971 S.C.82; *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner,* A.I.R.1985 S.C. 323.

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Mohan, dated 3.4.78 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.627 of 1976 presented under Article 226 of

the Constitution of India to issue a Writ of *Certiorari* calling for the records relating to order dated 29.11.75 bearing No.D1/TN/4245A/Regl./75 by the Second Respondent and quash the same.

S.Govind Swaminathan for Subramaniam, for Appellant.

T.Somasundaram, Additional Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.:- This appeal is directed against the order of Mohan, J. in Writ Petition No.627 of 1976 holding that the establishment of the appellants is not a new establishment so as to have the benefit of the non-applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter referred to as the Act under section 16(1)(b). The circumstances under which the said writ petition was filed by the appellants may briefly be noted. One Messrs. Veekay Engineering Industries a firm of partnership was carrying on business as technical consultants and designers. It had also an engineering establishment wherein they were engaged in fabrication and manufacture of structural and other mechanical engineering products including conveyor belts. On 10th November, 1969 they closed the said engineering division and confined their activities to rendering service as technical consultants and designers. The factory workers and staff who were employed in the engineering division raised an industrial dispute contending that the closure was not *bona fide* and therefore the closure was not justified. That dispute went before the Labour Court, which after due enquiry, held that there was a *bona fide* closure. A few days after the closure of the said business, Messrs. Veekay Engineering Industries leased out the land, building and machinery to the appellants, M/s. Conveyor Equipment Company (Private) Limited. According to the terms of the lease deed, the lessors, Messrs. Veekay Engineering Industries, had nothing to do with the business to be carried on by the lessees. The lease deed also refers to the fact that the lessors had given up and closed permanently their manufacturing activities. It also proceeds on the basis that it was the responsibility of the lessees to apply for and obtain a factory licence for any business that they may carry on, as per their memorandum of association. The lease deed contains three schedules, schedule 'A' dealing with land, schedule 'B' dealing with the superstructure and schedule 'C' dealing with machinery, which are to be taken by the lessees as per the terms of the lease deed. After the said lease deed, the appellants have chosen to carry on the business of fabrication and manufacture of structural and other engineering products, after obtaining the requisite factory licence in their name. Thereafter the appellants on 27th October, 1972 approached the Regional Provident Fund Commissioner seeking a clarification as to whether they can claim the benefit of non-applicability of the provisions of the Act for a period of three years, since the inception of their establishment. The Regional Commissioner, Provident Funds, Madras, by his letter dated 17th November, 1972 directed the appellants to implement the scheme from 26.11.1969 onwards by submitting the requisite returns from November, 1969 onwards and by remitting the provident fund contributions and administrative charges as provided in the Act. Thereafter the appellants sent a reply to the Regional Commissioner, Provident Funds, by their letter dated 11th December, 1972 wherein they had explained that their company was started newly as a separate and independent concern and was registered under the Companies Act; that it was also registered under the Factories Act, after its formation in November, 1969; that the appellants did not purchase the undertaking or the business as such, which was run by Messrs. Veekay Engineering Industries. nor did they purchase the same as a going concern and nor even did they continue to run the said establishment as an old establishment. Along with their reply, a copy of the memorandum and articles of association, a copy of the factory licence and a copy of the award of the Labour Court, Madras made in the industrial dispute between the workmen and management of M/s.Veekay Engineering Industries, were

enclosed and the appellants prayed that the Act and the scheme may be applied to their company only from the date on which the three year period expired. The request of the appellants was, however, turned down and they were informed by a letter dated 23rd February, 1973 by the Regional Commissioner, Provident Funds, that if the appellants were not implementing the provisions of the Act and the scheme within 15 days thereof, action would be taken to recover the amounts due under the Act by having resort to the provisions of the Revenue Recovery Act. Subsequently also there has been exchange of correspondence and ultimately the Regional Commissioner, Provident Funds, passed an order dated 29th November, 1975 threatening to take coercive proceedings for non-implementing the Provisions of the Act and the scheme with effect from November, 1969. It is at that stage the appellants came to this Court by way of the above writ petition seeking to quash the said order of the Regional Commissioner, Provident Funds dated 29th November, 1975.

2. In the writ petition the case of the writ petitioners-appellants was that their concern was entirely a new and different concern, that it had nothing to do with Messrs. Veekay Engineering Industries, that it had obtained a separate and fresh factory licence and it was only on the basis of the said factory licence the activity of fabrication and manufacture of conveyor belts was going on, that the appellants neither purchased the old concern as a going concern nor did they continue to run the old establishment; that there was absolutely no continuity of the business of the old establishment and that therefore their establishment should be taken to be a new establishment coming within the purview of section 16(1)(b) of the Act. The said writ petition was resisted by the Regional Commissioner, Provident Funds, contending that Messrs. Veekay Engineering Industries, which is a partnership firm, still exists and carries on business and also makes its contributions under the Act; that the said firm is carrying on two businesses, viz., (1) rendering service as consultants and designers; and (2) manufacturing engineering materials, and that it has merely leased out that part of the business, namely, manufacturing engineering materials, to the appellants from 26th November, 1969; that what all had happened is only a change in the management of the business, a mere change in the management of the business will not make the business a new one, that there is no change of ownership also; and that therefore the establishment carried on by the appellants is not a new establishment so as to attract section 16(1)(b) of the Act. It was also pointed out in the counter-affidavit that since the managing partner of Messrs. Veekay Engineering Industries is also the Managing Director of the appellants Messrs. Conveyor Equipment Company (Private) Limited, the establishment carried on by the appellants cannot be taken to be a new one. Mohan, J. after consideration of the facts set out in the pleadings and the contentions advanced by the parties, found that the partnership firm, M/s. Veekay Engineering Industries, which was carrying on two businesses of consultants and of manufacturing engineering materials had closed on 10th November, 1969 its manufacturing activity, and confined its business only to rendering service as technical consultants and designers, that thereafter it leased out the site, building and machinery to the appellants and that it is only the appellants' company which is now carrying on the business of manufacturing conveyor belts. Based on the said findings, the learned Judge took the view that the establishment run by the appellants cannot be taken to be a new establishment for the reason that the concept of lease and new establishment are diametrically opposed to each other, and the fact that the appellants have taken a lease of the land, building and machinery itself postulates continuance of ownership in the lessors. Thus, the learned Judge held that since the establishment run by the appellants is still owned by the lessors, it is not a new one and as such they cannot claim the benefit of non-application of section 16(1)(b) of the Act.

3. In this appeal, the decision of Mohan, J. has been questioned by the appellants. According to the appellants, the learned Judge has proceeded on the

basis of an error that there has been a lease of the establishment as such, while in the earlier part of the judgment the learned Judge has himself referred to the fact that the earlier business was closed and that the lease is only as regards the land, building and machinery. The learned counsel for the appellants contends that only in the case of lease of an establishment as such, the lessee should be taken to continue the existing establishment owned by the lessor and that on the facts of this case, there is no continuity of the running of the establishment and only in cases where there is such continuity the benefit of section 16(1) (b) of the Act could be denied.

4. On a due consideration of the matter, we are not inclined to agree with the reasoning of the learned single Judge that the establishment of the appellants is not a new establishment within the meaning of section 16(1)(b) of the Act. It is no doubt true that the appellants have taken on lease the site, building and machinery. But the lease is not of the establishment as a whole or as a going concern. It is not also in dispute that none of the workmen in the previous establishment was employed by the appellants in their company. As a matter of fact, on the closure of the establishment by the partnership firm, Messrs. Veekay Engineering Industries, closure compensation was paid to the workmen. The factum of closure was also questioned by the workmen and the Labour Court, on such a dispute, clearly held that the closure was genuine and *bona fide* and therefore the factum of the closure could not be challenged. Thus, the facts as have been found by the learned single Judge and which also stand established from the documents in this case, will clearly indicate that there had been a closure of the establishment run by M/s. Veekay Engineering Industries and the starting of a new establishment by the appellants, who are the lessees of the land, building and machinery. The closure of the establishment by Messrs. Veekay Engineering Industries was on 10.11.1969 and the lease of the land, building and machinery by the said firm to the appellants was on 26.11.1969 and the appellants started manufacturing of conveyor belts with effect from 1st December, 1969. Thus, the facts established will clearly indicate that earlier establishment as such was not leased out by the Messrs. Veekay Engineering Industries to the appellants and that the lease was only in respect of land, building and machinery. That the establishment as such could not have been leased out is also clear from the fact that there has been closure of the establishment by Messrs. Veekay Engineering Industries, as has been held by the Labour Court on a dispute having been raised by the workmen of the said establishment. In this case the learned single Judge himself has found that there has been a closure on 10.11.1969 and that the land, building and machinery have alone been leased out on 26.11.1969 to the appellants. Though the interval is only about 16 days, factually and legally there has been discontinuity of the old establishment and the starting of a new establishment by the appellants. In such circumstances, the old establishment cannot be taken to have been continued.

5. The Labour Court in its award in I.D.No.2 of 1970 on its file dealing with the question of genuineness of the closure of the establishment has expressed:

> "It is not as if the same workshop was continued in a different name, although there is a different business started by M.W.1 and others by the name Conveyor Equipment Company (P) Limited, under Ex.M-38. This is entirely a different concern and as such it cannot be stated that the management have fraudulently closed the original business with a view to victimise the workers by retrenching them.
>
> ....
>
> Hence this is not a case in which closure was done in a secret manner, with a view to victimise the workers. Later on under a different partnership a new firm Conveyor Equipment Co., (P) Limited is formed. It pays rent to Veekay Engineering Co., as per Ex.M-34. The report of that company is marked as Ex.M-35. M-39 shows the actual payment of rent. It was

registered as per Ex.M-38. Hence the two companies are entirely different companies."

6. More or less on a similar set of facts, the Supreme Court in *The Provident Fund Inspector, Trivandrum v. The Secretary, N.S.S.Co-operative Society, Chengannacherry*, (1970)2 S.C.R.481= (1971) Lab.I.C.18= (1969) K.L.T.703= (1970) L.W.(Crl.) 171= A.I.R.1971 S.C.82 has held that the benefit of section 16(1)(b) of the Act will be available in a case where the establishment was closed and a new establishment was established to run the same industry or business. In that case, a printing press established in the year 1946 was sold in 1961 and the work of the press was stopped on sale and the purchaser restarted the same press after a break of about three months. The persons employed previously were not continued in service, but a fresh recruitment of employees took place among whom only six happened to be previous employees and the other employees had been paid closure compensation at the time of the sale by the previous owner. On those facts, the Supreme Court held that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that the benefit of non-applicability of the Act under section 16(1)(b) thereof for a period of three years was available to the purchaser from the date on which he re-started the business. The reasoning of the Supreme Court is contained in the following extract:

> "On a discussion of the entire evidence and in view of the fact that the burden of proof lay on the appellant, we think that the conclusions of fact which must be accepted are: that, at the time of the purchase, a new owner came in place of the previous owner; the work of the press was stopped on sale and was restarted after a break of about three months: the machinery in the press was also altered: the persons employed previously were not continued in service, while a fresh recruitment of employees took place, amongst whom only six happened to be previous employees: and compensation was paid to the workmen at the time of the sale by the previous owner. On these facts, no other conclusion can be drawn, except that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that, in this case, the benefit of non-applicability of the Act under section 16(1)(b) of the Act for a period of three years was available to the respondent from June or July, 1961 when the new establishment was set up."

The facts in the present case are substantially the same as have been found in the above case before the Supreme Court except that in the case before the Supreme Court the interval between the closure of the establishment by the previous owner and the restarting of the business by the purchaser was three months, while in the present case the interval is about 20 days. But such interval will not be a deciding factor in considering the question as to whether there has been continuance of an establishment or not. Once there is a closure of the old establishment, whatever may be interval of time between the closure by the previous owner and the restarting of the business by another management, it must be taken that the establishment started was a new one and that it is not a continuance of the old establishment. The principle of the said decision, in our view squarely applies to the facts of the case before us.

7. The learned counsel for the appellants would however rely on a decision of the Supreme Court in *Sayaji Mills Ltd. v. Regional Provident Fund Commissioner*, A.I.R.1985 S.C.323. But after going through the said decision, we are of the view that the said decision is not applicable to the facts of the present case. In that case it has been actually found that there was no closure of the old establishment, but there was merely a stoppage or interruption of the business of the establishment, as a result of an order of winding up passed against the company which owned the establishment. Later the Official Liquidator, who came into the picture after the order of winding up, sold the

establishment as a going concern and after purchase the purchaser continued the business of the establishment. On those facts, it has been held by the Supreme Court that there is a continuity of the establishment, and that the mere interruption of the work of the establishment for some time would not amount to a closure of the establishment and a starting of a new establishment by the purchaser. As a matter of fact, we find that the earlier decision of the Supreme Court in *The Provident Fund Inspector, Trivandrum v. The Secretary, N.S.S.Co-operative Society, Chengannacherry*, (1970)2 S.C.R. 481= A.I.R.1971 S.C.82 has been referred to and distinguished in *Sayaji Mills Limited v. Regional Provident Fund Commissioner*, A.I.R.1985 S.C.323 on the ground that while in the earlier case there is closure of the establishment, in the later case there is only an interruption of the work owing to the order in the winding up proceedings and mere interruption of work cannot be considered as a closure of the business. The Supreme Court, on the facts, found in *Sayaji Mills Limited v. Regional Provident Fund Commissioner*, A.I.R.1985 S.C.323 that the establishment continued right through and there was only a change of management and that mere change of management cannot give rise to a new establishment, as it cannot be postulated that each time when there is a change of hands, a new establishment comes into existence.

8. We are of the view that the present case before us falls squarely within the ruling in *The Provident Fund Inspector, Trivandrum v. The Secretary, N.S.S. Co-operative Society, Chengannacherry*, (1970)2 S.C.R.481= (1971) Lab.I.C.18= (1969) K.L.T.703= A.I.R.1971 S.C.82 and it will not fall within the ruling in *Sayaji Mills Limited v. Regional Provident Fund Commissioner*, A.I.R.1985 S.C.323. In this case the evidence is that the partnership firm, Messrs. Veekay Engineering Industries, the previous owner, had closed a part of its establishment and it is only after such closure, a lease of the land, building and machinery has been given to the appellants. There was a complete stoppage of work as a result of the closure of the establishment and all the previous employees had been discharged on payment of due closure compensation. Their attempt to challenge the validity of the closure has also failed, the Labour Court holding that the closure was genuine and *bona fide* After such closure, a lease of land, building and machinery was given to the appellants and the appellants have later started the same business as a new concern. As already stated, the persons employed previously were not continued in service by the appellants and there has been a fresh recruitment of workmen by the appellants. Thus, the facts established in the case indicate that there has been a closure of the old establishment run by Messrs. Veekay Engineering Industries and the setting up or starting of a new establishment by the appellants after they had taken on lease the land, building and machinery from the former owner. As already stated, the lease is only in respect of land, building and machinery and it is not of the establishment as such, that is, the industry as a going concern. The learned single Judge has proceeded on the basis that once there is a lease of the land, building and machinery, the lease should be taken to comprise of the business as well. We are not in a position to accept the said reasoning. It is no doubt true that if the business as such is transferred by way of lease, then it can be postulated that it is only a change of management and not of ownership and that a mere change of management will not give rise to starting of a new business. But in this case the lease could not have been of the industry or establishment as such as a going concern is clear from the fact that the establishment was admittedly closed earlier to the lease and the terms of the lease also do not indicate that the lease is of the business as such.

9. In this view of the matter and following the decision of the Supreme Court in *The Provident Fund Inspector, Trivandrum v. The Secretary, N.S.S. Co-operative Society, Chengannacherry*, (1970)2 S.C.R.481= (1971) Lab.I.C.18= A.I.R.1971 S.C.82 we allow the appeal and set aside the order of the learned single Judge and hold that the appellants

will be entitled to the benefit of non-applicability of the Act under section 16(1)(b) of the Act. There will be no order as to costs.

R.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V. Ramaswamy and David Annoussamy, JJ.*

*Writ Appeal No.238 of 1981.
13th September, 1984.

Bharat Pulverising Mills (P) Limited *Appellant**

v.

The Secretary to the Government of Tamil Nadu, Revenue Department, Madras-9 and another *Respondents.*

(A) Tamil Nadu Urban Land Tax Act (12 of 1966), section 27(1) - G.O.Ms.No. 2625, dated 27.12.1976 - Validity - Restriction of the applicability of the method of valuation to the city of Madras alone - Whether arbitrary, unreasonable and has no relation to the nexus sought to be achieved.

(B) Constitution of India (1950), Article 14.

It may be seen from the various provisions that the Tamil Nadu Urban Land Tax Act as it is, applied to the urban land in the City of Madras with effect from the 1st day of July, 1971. But in determining the tax, the market value as on the 1st day of July, 1963 shall be the basis. So far as the Madras City Belt Area is concerned the tax is levied with effect from the 1st day of July, 1975 and the market value as on the 1st day of July, 1971, shall be the basis. This was with reference to the history of the legislation itself and the various stages in which it has undergone amendments. Naturally, therefore, charging provision is given effect to with reference to various urban areas on different dates and necessarily therefore the market value has to be ascertained with reference to the different dates. It is clear that there is no question of discrimination and that the differentiation is historical and not by reason of any hostile discrimination. *[Para.6]*

It is not clear as to how the principles to be adopted in determining the market value for the purpose of levy of tax could be brought within the provisions of section 27 of the Act. If at all, the owners of the Madras City Urban Lands may be able to contend that they are liable to pay tax as on 1.7.1963 and not as on 1.7.1971 or at double the value as on 1.7.1963. But that question does not arise for consideration. Suffice it to say that there is nothing discriminatory so far as the Madras Belt Area owners are concerned. The Act provided as already stated, that they are liable to pay tax with effect from 1.7.1971. That is a clear provision under the Act itself and that could not be modified. The Government Order also did not purport to modify that provision. No question of discrimination therefore could arise on the facts and circumstances of this case. The discrimination, if any, as already stated in bringing into force on different dates and applying different market values with reference to different dates was due to the fact that the Act was made applicable to the Urban Land in the City of Madras on different dates and that with reference to the lands in the Madras City Belt Area on a later date. *[Para.7]*

Cases referred to:

Buckingham & Carnatic Co., Ltd. v. State of Madras, (1966)2 M.L.J.172; *V.Pattabhiraman v. Asst. Commr., Urban Land Tax,*

I.L.R. (1969)2 Mad.1: A.I.R.1971 Mad.61; *Asst. Commr., of Urban Land Tax v. B. & C. Co., Ltd.* (1970) 75 I.T.R.603= (1970)1 M.L.J. (S.C.) 55= (1970)1 An.W.R. (S.C.) 55= (1970)1 S.C.J.265= (1970)1 S.C.R.268= A.I.R.1970 S.C.169.

Appeal under Clause 15 of the Letters Patent against the order of Mr.Justice Padmanabhan, dated 27.8.1980 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.3668 of 1977 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the G.O.Ms.No.2625, Revenue Department, dated 27.12.1976 and quash the portion of the same by directing the striking out of the words "As far as the Madras City is concerned, however "occurring in paragraph 2(ii) of the said G.O.Ms.No.2625, Revenue Department dated 27.12.1976 in so far as the petitioner is concerned.

Raju K.Lukose, for Appellant.

The Advocate General and *K.S.Bakthavatchalam*, Additional Government Pleader (Commercial Taxes), for Respondents.

The Judgment of the Court was delivered by

Ramasvamy, J.:- This is an appeal against the dismissal of the Writ Petition No.3668 of 1977 which was filed for quashing a portion of the order in G.O.Ms.No. 2625, Revenue dated 27.12.1976 and for appropriate directions.

2. The appellant is a Company owning certain lands in Thiruvottiyur village. The Assistant Commissioner of Urban Land Tax in his proceedings dated 17.8.1976 determined the total area of the land held by the appellant and the market value thereof as on 1.7.1971 and levied urban land tax in the sum of Rs.93,873.77 and made a demand for payment of the same for the period from 1st July, 1975. This assessment order is questioned on the ground that in determining the market value as on 1.7.1971 for the purpose of determining the urban land tax payable by the appellant, the Assistant Commissioner should have taken the value as on 1.7.1971 at double the value as on 1.7.1963 as in the case of the urban land within the city of Madras applying G.O.Ms.No. 2625, Revenue dated 27.12.1976. It may be mentioned, however, that under this Government Order this principle of adopting the double value as on 1.7.1963 is to be applied only in respect of urban lands "as far as the city is concerned". It is because of the restrictive application of this double valuation of the market value as on 1.7.1963, in order to determine the market value as on 1.7.1971 only to the Madras City is concerned, the writ petitioner questioned the validity of the Government Order and contended that the restriction of the applicability of the method of valuation for the City of Madras alone is arbitrary, unreasonable and has no relation to the nexus sought to be achieved. and that therefore it offends Article 14 of the Constitution and has to be quashed.

3. The learned Counsel for the appellant did not want the entire Government Order to be quashed, but only that portion which restricts its application to the City of Madras, is to be omitted so as to make it applicable to all the areas. That portion of the impugned Government Order which calls for consideration reads as follows

> "The market value of land for purposes of assessment to the tax will continue to be determined as on 1.7.1971. As far as Madras City is concerned, however, in every case where the revised market value as on 1.7.1971 is more than double the value as on 1.7.1963, the value for purposes of assessment to tax will be limited to double the 1963 value."

This Government Order is stated to have been made for granting a relief in urban land tax in exercise of the powers under section 27 of the Act.

4. Before we deal with this main contention, we may refer to the provisions of the Act itself. Originally the Madras Urban Land Tax Act, 1963 was enacted which levied Urban Land Tax with effect from 1.7.1963. The constitutional validity

was questioned in this court and a Division Bench of this Court by a judgment reported in *Buckingham & Carnatic Co., Ltd. v. State of Madras*, (1966)2 .L.J.172 struck down the Act as violative of Article 14 of the Constitution of India. Subsequently the Act was re-enacted as Tamil Nadu Act 12 of 1966 with certain modifications. The validity of this Act also was questioned. Though a Full Bench of this Court in the decision reported in *V.Pattabiraman v. Asst. Commissioner, Urban Land Tax*, I.L.R. (1969)2 Mad.1= A.I.R.1971 Madras 61 held that certain provisions of the Act are *ultra vires*, yet the Supreme Court, on an appeal, however, reversed that judgment and held that the entire Act is valid and the judgment of the Supreme Court is reported in *Asst. Commissioner of Urban Land Tax v. B. & C. Co., Ltd.*, (1970) 75 I.T.R.603= (1970)1 S.C.R.268= (1970)1 M.L.J. (S.C.)55= (1970)1 An.W.R. (S.C.) 55= (1970)1 S.C.J.265= A.I.R.1970 S.C.169.

5. Tamil Nadu Act 12 of 1966 received the assent of the President on 9th September, 1966, and published in the Fort St. George Gazette on 10th September, 1966. However, section 1(2)(a) brought into force all the provisions except sections 19,47 and 48 with effect from 1st day of July, 1963. The charging section 5 provided that subject to the other provisions contained in the Act, there shall be levied and collected for every fasli year commencing from the date of commencement of the Act namely 1.7.1963, a tax on each urban land (hereinafter referred to as the urban land tax) from the owner of such urban land at the rate of 0.4 per centum of the market value of such urban land. Section 6 provided that for the purpose of this Act, the market value of the urban land shall be estimated to be the price which such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of the Act. The original Act 12 of 1966 enabled the Government by notification to bring into force the provisions of the Act to any other Municipal town or any township or any areas specified in the notification and within 16 kms of the City of Madras or such Municipal town or township. It may be seen from the provisions as it was originally enacted, the owners of urban land in the City of Madras are liable to pay urban land tax on and from 1.7.1963 with reference to the market value as on that date. However, in view of the pendency of the writ petition in which the validity of the provisions were questioned in this Court, which was the subject-matter of the decision in *V.Pattabhiraman v. Asst. Commissioner Urban Land Tax*, I.L.R. (1969)2 Mad.1= A.I.R.1971 Madras 61 the provisions were not given effect to fully at that time itself. As already stated a Full Bench of this Court in the decision in *Pattabhiraman v. Asst. Commr. Urban Land Tax*, A.I.R.1971 Mad.61 struck down certain provisions in the judgment dated 10th April, 1968. The Judgment of the Supreme Court holding the validity was dated 11th April, 1969. In the light of the decisions certain provisions were also amended by the Tamil Nadu Urban Land Tax Amendment Act, 1971. This Act in particular amended the charging section 5 and introduced section 5-A, among other amendments. In the place of the rate of tax at 0.4 per centum, the charging section provided that the tax shall be at the rate specified in the schedule. The schedule gave a graded rate of tax with reference to the total extent of urban land held by the owner as against the uniform rate of 0.4 per centum originally provided. Section 5-A further provided that the tax shall be levied with reference to the urban land in the City of Madras with effect from the 1st day of July, 1971 as against the original levy with effect from 1.7.1963. However, clause (2) of section 5-A stated that for the purpose of determining the amount of urban land tax under sub-section (1) of section 5-A, the market value as on the 1st day of July, 1963, shall be the basis. Thus though the levy itself is made to be effective from 1st day of July, 1971, the basis of the market value to be adopted for the purpose of such taxation so far as the lands in the city are concerned, was the 1st day of July, 1963. In 1975, the Act was further amended by Tamil Nadu Act 49 of 1975. This Act introduced clause (1-A) in section 1 and section 5-C among the various other consequential provisions in the main Act. By clause (1-A), it was provided that the

Act shall be deemed to have come into force on the 1st day of July, 1975 in the area comprised within sixteen kilometres of the outer limits of the City of Madras (hereinafter referred to as the Madras City Belt Area). Provided however, that for the purpose of determining the amount of urban land tax under the Act in respect of the City Belt Area, the market value as on the 1st day of July, 1971, shall be the basis. Corresponding to section 1-A a main charging section also was introduced in section 5-C levying urban land tax in the Madras City Belt Area with effect from the 1st day of July, 1975. Sub-section (2) of Section 5-C further provided that for the purpose of determining the amount of urban land tax under sub-section (1) in respect of Madras City Belt Area, the market value as on the 1st day of July, 1971 shall be the basis. The schedule also correspondingly was amended providing for different rates for residential and non-residential purposes and for the City Belt Area.

6. It may be seen from the various provisions that the Act as it is, applied to the urban land in the City of Madras with effect from the 1st day of July, 1971. But in determining the tax, the market value as on the 1st day of July, 1963 shall be the basis. So far as the Madras City Belt Area is concerned, the tax is levied with effect from the 1st day of July, 1975 and the market value as on the 1st day of July, 1971, shall be the basis. This was with reference to the history of the legislation itself and the various stages in which it has undergone amendments. Naturally, therefore, the charging provision is given effect to with reference to various urban areas on different dates and necessarily therefore the market value has to be ascertained with reference to the different dates. It is clear that there is no question of discrimination and that the differentiation is historical and not by reason of any hostile discrimination. We may also mention that the appellant had not questioned the constitutional validity of section 5-A or section 5-C which alone makes a distinction in ascertaining the market value for the purpose of levy of tax.

7. The impugned Government Order is stated to have been made under section 27(1) which reads as follows:

> "27(1). The Government, if satisfied that the payment of urban land tax in respect of any class of urban lands or by any class of persons will cause undue hardship, they may, subject to such rules as may be made in this behalf, by order, -
>
> (a) exempt such lands or persons from the payment of the urban land tax, or
>
> (b) reduce the amount of such urban land tax whether prospectively or retrospectively."

We are not sure as to how the principles to be adopted in determining the market value for the purpose of levy of tax could be brought within those provisions of section 27 of the Act. If at all, the owners of the Madras City Urban Lands may be able to contend that they are liable to pay tax as on 1.7.1963 and not as on 1.7.1971 or at double the value as on 1.7.1963. But that question does not arise for consideration. Suffice it to say that there is nothing discriminatory so far as the Madras Belt Area owners are concerned. The Act provided as already stated, that they are liable to pay tax with effect from 1.7.1971. That is a clear provision under the Act itself and that could not be modified. This Government Order also did not purport to modify that provision. No question of discrimination therefore could arise on the facts and circumstances of this case. The discrimination, if any, as already stated in bringing into force on different dates and applying different market values with reference to different dates was due to the fact that the Act was made applicable to the Urban Land in the City of Madras on different dates and that with reference to the lands in the Madras City Belt Area on a later date. There is therefore no substance in the contention of the learned Counsel for the appellant that there was any invidious discrimination in the impugned Government Order offending any of the provisions of the Constitution of India. The writ appeal accordingly fails and it

is dismissed. But there will be no order as to costs.

R.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.1059 of 1984. *8th January,* 1985.

R.Venkataswami Naidu *Petitioner**

v.

M/s. South India Viscose Ltd., Coimbatore *Respondent.*

Civil Procedure Code (V of 1908), sections 21 and 9 - Courts having no jurisdiction to entertain suit - Order passed in interlocutory application in such suits - Binding nature of such orders.

If there is total lack of competence in a Court to entertain the suit, then there is no difficulty at all, because any order or adjudication made by such a court, would be a nullity. Even if the objection is based upon want of jurisdiction on the ground of either pecuniary or territorial jurisdiction, such a defect would also strike at the very authority of the Court to pass a decree and it cannot be cured by consent of parties. Even on the assumption that there could be a waiver of the objection in the manner recognised by law, there is no question of waiver at all where the defendant clearly raised an objection regarding the jurisdiction. [Para.10]

If the Court had no jurisdiction at all to entertain the suit, anything done by it, by assuming such jurisdiction, would be totally without competence on its part to do so. Merely because such incompetence is discovered subsequently, that would not render the intermediate act valid and binding till the date of discovery of such incompetence. Otherwise it would lead to a very strange situation in that orders passed by a Court, incompetent to entertain the proceedings would be valid between the date when the proceedings are entertained and the discovery of its incompetence and would not be either binding or operative, after the date of discovery of the incompetence by the Court. Either the Court is competent or it is incompetent to entertain suits and pass orders. [Para.10]

Cases referred to:-

N.Senapathi v. Sri Ambal Mills, (1965) M.L.J. (Crl.) 696: I.L.R. (1966)1 Mad.143: A.I.R.1966 Mad.53, *Century Flour Mills v. S.Suppiah,* (1975)2 M.L.J.54= A.I.R.1975 Mad.270 (F.B.), *Hira Lal v. Kali Nath,* A.I.R.1962 S.C.199= (1961)2 S.C.J.592; *Kammaran Nambiar v. Valia Ramunni,* (1938)1 M.L.J.193. A.I.R.1938 Mad.257; *Kiran Singh v. Chaman Paswan,* 1954 S.C.J.514. (1954)2 M.L.J.60: (1955)1 S.C.R. 117. A.I.R.1954 S.C.340.

M.R.Narayanaswami, for K.Venugopal, for Petitioner.

S.Govind Swaminathan for King & Patridge, for Respondent.

The Court made the following

ORDER:- The plaintiff in O.S.No.2017 of 1983, District Munsif's Court, Coimbatore, is the petitioner in this Civil Revision Petition. In the respondent-company, with which the petitioner appears to have been associated since its inception, he holds two shares. Prior to 29.9.1983, the petitioner was one of its Directors. The Twenty-fifth Annual General Meeting of the respondent-company was scheduled to be held on 29.9.1983 at 11.30 a.m. Item 2 in the agenda for that meeting related to the appointment of a Director in the place of the petitioner, who retired by rotation and was eligible to offer himself

for re-appointment. The annual report of the company and the notice of the Twenty-fifth Annual General Meeting were sent to all the shareholders of the company well in advance. While matters stood thus, on 28.9.1983, one P.J.Joseph, who held two shares in the respondent-company instituted S.C.Suit No.5658 of 1983 before the City Civil Court, Bombay, against the respondent-company, the petitioner herein as well as other Directors and obtained an *ad interim* injunction restraining the respondent-company and its Directors from holding the Twenty-fifth Annual General Meeting of the Company on 29.9.1983. It further appears that the plaintiff in S.C.Suit No.5658 of 1983, City Civil Court, Bombay, reached Coimbatore in the morning of 29.9.1983 and served the order of *ad interim* injunction on the petitioner in his house at about 11 a.m. and thereafter proceeded to the place where the Twenty-fifth Annual General Meeting of the respondent-company was scheduled to be held and informed the Chairman and Secretary of the company at about 11.20 a.m. about the *ad interim* injunction order passed by the City Civil Court at Bombay and also served the order of *ad interim* injunction on the Secretary of the company and the Chairman for the meeting, Mr.Desai. Though it is claimed that thereafter there, was some discussion as well as protests, the Twenth-fifth Annual General Meeting of the company went on as scheduled and certain resolutions were passed. In so far as the petitioner was concerned, his re-appointment as a director of the company was also considered and the resolution in that regard was declared as lost, as 3,90,732 votes were cast against the re-appointment of the petitioner, while 1,807 votes alone were cast in his favour. The result was, the petitioner ceased to be a Director of the respondent-company and was not re-appointed and the resolution of the company to that effect was also communicated to the petitioner. Subsequently, on 7.10.1983, the petitioner instituted O.S.No. 2017 of 1983, District Munsif's Court, Coimbatore, praying for a declaration that the Twenty-fifth Annual General Meeting of the respondent-company held on 29.9.1983 at 11.30 a.m. in contravention of the order of *ad interim* injunction passed by the City Civil Court at Bombay in S.C.Suit No.5658 of 1983 is illegal and for a permanent injunction restraining the respondent-company from implementing the resolutions passed at that meeting and also from interfering with the rights of the petitioner from functioning as a Director of the respondent-company and other incidental reliefs. In I.A.No.2487 of 1983 in O.S.No.2017 of 1983, the petitioner prayed for an *ad interim* injunction restraining the respondent-company from implementing the resolutions passed at the Twenty-fifth Annual General Meeting held on 29.9.1983 and from holding any meeting of the Board of Directors without the participation of the petitioner therein. The main ground urged by the petitioner in that application was that the proceedings of the Twenty-fifth Annual General Meeting were held in violation of the order of *ad interim* injunction passed by a competent Court and all its proceedings were illegal and he was entitled to continue to be a Director in the respondent-company.

2. On 7.10.1983, the learned District Munsif, Coimbatore, granted an *ad interim* injunction and ordered notice on the injunction application returnable by 7.11.1983. Subsequently, it was realised that a caveat had already been lodged by the respondent-company, which was also in force and when that was brought to the notice of the Court, the order of *ad interim* injunction passed by it earlier was re-called and only notice was ordered on the injunction application returnable by 7.11.1983. Thereafter, the respondent-company filed its counter.

3. In the counter filed by the company, it raised an objection regarding the maintainability of the suit as well as the application for injunction on the ground that the reliefs prayed for therein could be claimed by the petitioner only in the suit instituted before the City Civil Court at Bombay. An objection was also taken that owing to the non-joinder of necessary parties, namely the Directors of the company, the suit is bad. Yet another objection that was raised was that the suit had not been instituted by the petitioner in a representative capacity

and that there was no proper and valid service of the order of *ad interim* injunction passed by the City Civil Court at Bombay on the respondent-company. The proceedings of the Twenty-fifth Annual General Meeting held on 29.9.1983 were claimed to be quite in order, valid as well as legal. The illegality or otherwise of the Twenty-fifth Annual General Meeting of the respondent-company held on 29.9.1983 was a matter, according to the respondent, to be decided only by that Court which passed the order of *ad interim* injunction and which was by then, seized of an application alleging contempt also taken out by P.J.Joseph. It was the further case of the respondent that the propriety and the validity of the service of the order of *ad interim* injunction can also be decided only by the City Court, Bombay, and therefore, the suit as well as the application for injunction should be stayed under the provisions of the Civil Procedure Code. Inasmuch as the petitioner ceased to be a Director of the respondent-company with effect from 29.9.1983, the respondent questioned the *locus standi* of the petitioner to institute the suit as well as to file the application and stated that the balance of convenience was also only in favour of the respondent-company. The respondent-company, therefore, prayed for the dismissal of the application for injunction.

4. Before the learned District Munsif, Coimbatore, on behalf of the petitioner, Exhibits A-1 to A-13 were marked while on behalf of the respondent-company, Exhibits B-1 to B-3 were filed and no oral evidence was let in on both sides. On a consideration of the evidence so placed, the learned District Munsif took the view that the respondent-company was put on notice of the *ad interim* injunction order passed by the City Civil Court, Bombay, prohibiting the conduct of the Twenty-fifth Annual General Meeting, scheduled to be conducted on 29.9.1983, that the respondent-company understood the nature of the *ad interim* injunction order passed by the said Court at Bombay, that the petitioner had been removed from the Directorship of the respondent-company by the proceedings of the Twenty-fifth Annual General Meeting of the respondent-company without any fault of his and by depriving him of a valuable right to get himself re-elected by participating in the Twenty-fifth Annual General Meeting, and that the balance of convenience, under those circumstances, was also in favour of petitioner. In that view, I.A.No.2487 of 1983, was allowed.

5. Aggrieved by that order, the respondent-company preferred an appeal in C.M.A.No.1 of 1984 to the District Judge, Coimbatore. In that appeal, the respondent-company filed I.A.No.45 of 1984 under Order 41, rule 27, Civil Procedure Code for reception as additional evidence in the appeal the final orders passed by the City Civil Court at Bombay on 12.1.1984 on certain Notices of Motion taken out by the respondent-company in S.C.Suit No.5658 of 1983, City Civil Court, Bombay on the ground that that order had a material bearing on the point arising for decision in the appeal. Though that application was opposed by the petitioner herein, the learned District Judge felt that since the documents were only the certified copies of Court proceedings no prejudice will be caused to the petitioner and directed the reception of the orders of the City Civil Court, Bombay, as additional evidence in the appeal and marked them as Exhibits B-4 and B-5. Dealing with the merits of the appeal, the learned District Judge found that though an *ex parte* order of *ad interim* injunction was granted by the City Civil Court, Bombay, on 28.9.1983, the very same court had, later, on the Notice of Motion by the respondent-company, found that it had no jurisdiction to entertain the suit in S.C.Suit No.5658 of 1983, that the injunction application filed by P.J.Joseph as well as the contempt application filed by him had been dismissed and further that the plaint itself had been directed to be returned on the finding that no part of the cause of action arose within the jurisdiction of the City Civil Court at Bombay, and therefore, on the strength of the order of *ad interim* injunction passed earlier by the City Civil Court at Bombay, the petitioner cannot be granted the relief of injunction, as was done by the trial Court. In that view, the appeal was allowed and I.A.No.2487 of 1983 filed by the petitioner was dismissed. The correctness of that order is

challenged in this Civil Revision Petition.

6. The learned Counsel for the petitioner submitted that the holding of the Twenty-fifth Annual General Meeting by the respondent-company and the business transacted thereat contrary to the order of *ad interim* injunction granted by the City Civil Court, Bombay, would render the meeting as well as the other proceedings therein illegal. It was further pointed out that the subsequent order passed by the City Civil Court, Bombay on the Notice of Motion of the respondent-company would not make the original order of *ad interim* injunction *non est* or void and anything done in contravention of such an order, which was good until it was set aside, would put back the parties in the original position which they occupied. The learned Counsel also attempted to distinguish between a case of total lack of jurisdiction or competence in a Court and an objection relating to the pecuniary or territorial jurisdiction to contend that this case is one where there was no total want of competence in the Court and no objection had also been taken to the jurisdiction of the local Court, which suggested a waiver. Reliance in support of these submissions was placed upon the decisions in *N.Senapathi v. Ambal Mills*, (1965) M.L.J. (Crl.) 696= I.L.R.(1966)1 Mad.143= A.I.R.1966 Mad.53, *Century Flour Mills v. S.Suppiah*, (1975)2 M.L.J.54= A.I.R.1975 Mad.270 (F.B.), *Hira Lal v. Kali Nath*, (1961)2 S.C.J.592= A.I.R.1962 S.C.199 and *Kammaran Nambiar v. Valia Ramunni*, (1938)1 M.L.J.193= A.I.R.1938 Mad.257, Per contra, the learned Counsel for the respondent-company contended that in view of the orders passed by the City Civil Court, Bombay, on the Notice of Motion taken out by the respondent-company, that court had no jurisdiction whatever to entertain the suit and an order passed by a Court without jurisdiction would be a nullity and, therefore, no exception could be taken either to the legality or propriety of the proceedings of the Twenty-fifth Annual General Meeting or to the business transacted thereat. Strong reliance in this connection was placed by the learned Counsel upon the decision of the Supreme Court in *Kiran Singh v. Chaman Paswan*, 1954 S.C.J.514= (1954)2 M.L.J.60= (1955)1 S.C.R.117= A.I.R.1954 S.C.340. The learned Counsel further submitted that in this case pointedly objection had been raised by the respondent-company to the jurisdiction of the City Civil Court at Bombay, and on the upholding of such an objection, any order passed in the interregnum alone cannot be treated as valid as the said court *ab initio* lacked jurisdiction to entertain the suit instituted by P.J.Joseph and the objection regarding the jurisdiction had not in any manner been waived or given up by the respondent-company.

7. Thus, the principal question that arises for consideration is, whether the petitioner is *prima facie* entitled to order of injunction as prayed for by him based on the order of *ad interim* injunction granted by the City Civil Court, Bombay, on 28.9.1983 in the suit instituted by P.J.Joseph against the respondent-company, the petitioner and other Directors as well. There is now no dispute before this Court that the respondent-company was put on notice and also served with an order of *ad interim* injunction issued by the City Civil Court, Bombay, with reference to the Twenty-fifth Annual General Meeting of the company held on 29.9.1983. Equally, there is no dispute that by the order dt. 12.1.1984 marked as Exhibits B-4 and B-5, the City Civil Court, Bombay, had dismissed the application for injunction taken out by him for punishing the respondent-company, the petitioner as well as other Directors for wilful disobedience of the order of *ad interim* injunction passed by the City Civil Court, Bombay, on 28.9.1983 in Notice of Motion No.5053 dt. 38.9.1983. It is seen from that order that the respondent-company had raised and persisted in its plea that the City Civil Court, Bombay, had no jurisdiction to entertain the suit filed by P.J.Joseph. On that question, it was found by the City Civil Court, Bombay, that the plaint proceeded to state that the respondent-company had its office in Bombay was also carrying on business in Bombay and that was an incorrect statement of fact. No material also was placed before the City Civil Court, Bombay, to show that the respondent-company carried on any business at Bombay. The earlier holding of some of the meetings at Bombay was also held

of Tamil Nadu in connection with certain alleged statements which appeared in the 'Indian Express' dated 24th August, 1977. The Government have carefully considered his request, and are of the view that there is no basis for granting such permission. Accordingly, the permission applied for by Thiru Badrinath I.A.S.Secretary, Board of Revenue (FP) is refused."

9. The petitioner then filed the petition under Article 226 of the Constitution of India, in which the relief sought was the quashing of the order of the first respondent Government of Tamil Nadu, dated 7th February, 1978, and the issue of a Mandamus to direct the first respondent to grant to the petitioner sanction under Rule 17 of the Rules to institute a suit against the second respondent for damages for defamation.

10. In the writ petition, all the facts which have been recited above were set out. An affidavit was filed on behalf of the Government of Tamil Nadu controverting the stand taken by the petitioner. The Government took the stand that it applied its mind to all the material facts before passing the orders and it was denied that any *prima facie* case had been made on the facts and materials in the case. According to the Government, the petitioner did not appear to realise that while he claims to have a right to vindicate himself, Government was also under a duty in exercise of its powers under the rule, to protect officers from unnecessary harassment through vexatious court proceedings. The stand of the Government appears to be that the proceedings which the petitioner wanted to initiate in the form of a suit would be of a vexatious character.

11. Respondent 2 also filed an affidavit in the petition in which he took the stand that there was no interview with the correspondent face to face and that he did not remember the exact words used by him, but he had no motive or desire or intention to say anything calculated to damage the reputation of the petitioner nor did he use any such words which would damage his reputation. In paragraph 4 of the affidavit, he makes a statement that 'I certainly do not remember to have used the words ascribed to me in the news report, and now complained of as amounting to a defamatory imputation'. He further avers that whatever few words he said were only from the service point of view and were made in good faith in the discharge of official duties by way of explaining the rationale behind disciplinary action taken against the petitioner under the All India Civil Services (Conduct) Rules, 1968. He pleaded good faith when he made the remarks to Shastri Ramachandran and stated that as Chief Secretary to Government, he was the head of Civil Services and whatever remarks were made by him in telephonic conversation with Thiru Ramachandran were only by way of sustaining the action taken by the Government and had absolutely no personal angle. With reference to his one line letter, dated 25th August, 1977, he stated that it implied that the Government had no information to communicate to the petitioner and that, the expression 'I have no information to communicate to you on this subject' was used to convey the impression that he, as Chief Secretary to Government and acting on behalf of the Government had no information to communicate on the subject. The telephonic conversation with the correspondent was said to be only a casual conversation and according to him, since the letter of the petitioner did not indicate who the Government spokesman was, according to the second respondent, he was under no obligation to disclose what he had conversed over the telephone with Thiru Ramachandran. The letter was sought to be justified by stating that the petitioner's letter had not used the word 'you' and the petitioner had not alleged in his letter that he was the Government spokesman. The second respondent alleged that the letter from the petitioner did not give any hint that the petitioner was thinking of second respondent as the Government spokesman. He reiterated that he did not remember to have used any words or language which would damage the reputation of the petitioner or lower his standing in the eyes of others.

12. When the matter was heard by the

learned Judge, the validity of Rule 17 was challenged which contention was negatived and that argument is not now advanced before us. The learned Judge recorded a finding that the act which made the Government spokesman charge the petitioner as trying to sabotage the civil service from within was an official act. Indeed, before the learned Judge, the learned Advocate General has conceded that the act complained of was an official act, and therefore, the intended suit was to vindicate an official act which was the subject-matter of a defamatory criticism. The learned Judge found in favour of the petitioner that it could not be said with certainty that there was no *prima facie* case for a decision by a civil court on the question whether the remarks attributed to the second respondent were defamatory in character. Indeed, the learned Judge proceeded to decide the petition on the assumption that the remarks were defamatory. The learned Judge held in favour of the petitioner that in the exercise of its powers under Article 226 of the Constitution, the High Court could scrutinise the validity of the order of the State Government refusing sanction. The learned Judge after referring to the files which were produced before him took the view that though the Government order does not specifically refer to the non-admission of the statement by the second respondent, they were aware of the same, and, therefore, when the Government order referred to 'no basis' it was apparent that the Government was not willing to accept that the quoted press statement was made by the second respondent in the form in which it appeared. What seems to have weighed with the learned Judge when rejecting the petition was that the second respondent denied having uttered the exact words used in the press report, and he goes on to hold that the copy of the letter of Ramachandran, dated 14th December, 1977, was neither sent to the second respondent nor to the Government, the Government had called for the remarks from the second respondent on the allegations of the petitioner and though the order of the Government was cryptic, the use of the words 'no basis' in the light of the counter affidavits filed by the first and second respondents, would show that the Government had taken into account the fact that the second respondent had not accepted having uttered the exact words used in the press report. A contention seems to have been advanced before the learned Judge that the order of the State Government was vitiated by violation of the principles of natural justice, since the petitioner was not informed of the remarks of the second respondent. This contention was rejected. The argument that the order of the Government was vitiated by *mala fides* was also rejected. This order of the learned Judge is now challenged in this appeal.

13. The appellant who appears in person before us has contended that the denial of the second respondent was factually wrong and the Government instead of rejecting the application for sanction should have pulled up the Chief Secretary and asked him under what authority he had made the statements. He argued that the stand of the Government that there would be harassment of an officer through vexatious proceedings was not justified because the petitioner was entitled to have his honour vindicated and the view taken by the Government has the effect of depriving him of the valuable civil rights because, as he put it, the higher the status, the greater was the accountability, and since there was *prima facie* material to show that it was the second respondent who made the statement, the order of the Government has the effect of shielding the second respondent from the consequences of his misdemeanour. He also contended that the only other ground that the Government did not want a feud between two members of the Civil Service to take place in public was not justified, because Rule 17 of the Rules did contemplate that, where defamatory remarks were made by anybody against a Government servant, then he had the right to take necessary steps in a court of law.

14. The learned Advocate General who appeared for the first respondent, State Government, and Mr.Desabandhu who appeared for respondent 2, argued that the Government had taken into consideration all the relevant materials and if they

have *bona fide* reached a conclusion that sanction cannot be granted, the order of the Government should not be interfered with. It is argued by the learned Advocate General that respondent 2 had denied that he ever made the statement which was attributed to him and if it is now sought to be urged on the basis of a writing given by Mr.Ramachandran, that there is evidence to show that respondent 2 had uttered the alleged defamatory remarks, then fault could not be found with the order of the State Government, because Mr.Ramachandran's letter was not placed before the State Government. The learned Advocate General however, argued that if this Court was of the view that the order of the Government could not be sustained, then the matter must be remitted back to the Government for a fresh consideration and this Court could not in the exercise of its jurisdiction under Article 226 of the Constitution perform the function which properly belonged to the State Government under Rule 17 of the Rules.

15. Rule 17 of the Rules together with its Explanation reads as follows:

> "...No member of the Service shall except with the previous sanction of the Government have recourse to any court or to the press for the vindication of any official act which has been the subject-matter of adverse criticism or attack of a defamatory character.
>
> *Explanation:-* Nothing in this rule shall be deemed to prohibit a member of the Service from vindicating his private character or any act done by him in his private capacity, provided that he shall submit a report to the Government regarding such action."

16. It is implicit in Rule 17 that a Government servant has a right to have recourse to a court of law, for vindication of an official act in respect of which some adverse criticism has been made or attack of a defamatory character has been made. For vindicating the private character of a Government servant, or any act done by him in his private capacity, the constraint placed by the main part of Rule 17 that the Government servant shall not have recourse to the court without the previous sanction of the Government is not there. As already pointed out, the learned Judge has proceeded on the assumption, and indeed the learned Advocate General has also conceded before the learned Judge and this concession has not been withdrawn before us, that the act in respect of which the alleged defamatory remark has been made is an official act. The learned Judge has also found that the alleged remark in the press report is defamatory in character. None of these two findings is challenged before us on behalf of the respondents. We must, therefore, proceed on the footing that the remark made and published in the Indian Express, dated 24th August, 1977, that Mr.Badrinath was trying to sabotage the civil service from within, is a defamatory remark. Indeed, when such a remark is made in respect of some conduct or official act of a member of Indian Administrative Service, not much argument is necessary to show that the remark is of defamatory character.

17. The only question which, therefore, survives for consideration in this appeal is, whether the order of the State Government refusing to give sanction is open to interference by this Court? When rule 17 refers to the previous sanction of the Government, it vests discretion in the State Government to grant or to refuse the sanction. When the Government decides the question as to whether sanction as contemplated by Rule 17 should be granted or not, the scope of the enquiry before the Government must necessarily be whether the person who seeks the sanction of the Government has made out a *prima facie* case for getting the sanction of the Government in respect of the action which the Government servant proposes to take. While deciding whether the concerned Government servant has made out a *prima facie* case, the Government is bound to apply its mind to all the relevant circumstances which will enable the Government to come to a proper conclusion as to whether the concerned Government servant had made out a *prima facie* case. The Government is not called upon to decide the merits of the case

which is sought to be instituted in civil court by the petitioner. All that the Government was concerned in this case was, whether the petitioner *prima facie* is able to satisfy the Government that respondent 2 had made the remarks which have appeared in the press and which were admittedly of a defamatory character.

18. This question could not be decided merely on the denial of the person who is sought to be sued and for suing whom the permission of the Government was sought. No person who is facing the possibility of a suit or criminal prosecution in respect of which permission is sought under Rule 17 will ever admit that he has committed the act in respect of which the Government servant is seeking to sue him. While undoubtedly the Government may consider the version as given by the opposite party, the decision of the Government cannot be based only on what the proposed defendant in the suit has to say about the claim of the plaintiff. While deciding the question of sanction, the State Government has to weigh the defamatory allegations made against the proposed defendant, and has to arrive at a fair decision as to whether the plaintiff has a *prima facie* case which he is entitled to agitate in the civil court as in the instant case. The ground that a person will be faced with harassment because he will have to go through a litigation, is by itself not sufficient to reject the sanction, because if there is a *prima facie* case, then the consequent harassment which is likely to be caused cannot be a determinative factor as to whether the necessary sanction should be granted by the Government or not. What is of prime importance, therefore, is whether a *prima facie* case has been made out.

19. The order of the Government shows that it has taken this view that it has no basis for granting the permission, as sought. The necessary file containing the remarks of the second respondent on the letter for sanction, dated 28th December, 1977, was produced before the learned Judge. A grievance was made before us that those records were not shown to the petitioner and the learned Judge was not, therefore, entitled to take those records into consideration for holding that respondent 2 had denied that he had made any statement as alleged. Since this grievance was justified, and in all fairness the learned Advocate-General did not claim any privilege in respect of the said records, the records containing the notings consisting of the remarks of respondent-2, the opinion of the Law Secretary and the noting made under the signature of the Chief Minister were shown to the petitioner, and, therefore, the grievance that the denial should not be considered by this Court does not now survive.

20. On the face of it, the letter dated 7th February, 1978, written by the Government, under the signature of the Second Secretary does not give any reasons apart from saying that 'there is no basis for granting such permission'. We were, therefore, required to turn to the averments made by the Second Secretary, and the Second Secretary has stated in the affidavit that the Government has acted in a just and reasonable manner, having regard to the facts of the case. This hardly takes the matter any further. Indeed, the affidavit appears to be so vague that it is difficult to ascertain from the affidavit what were the facts which were considered by the State Government when the Government took the view that the sanction should be rejected. It is not enough for the State Government to say that relevant considerations have been taken into account and the Government had applied its mind to the material facts before passing orders. When the question regarding the validity of the refusal to sanction is itself in issue, the decision of that question must necessarily turn on whether relevant or irrelevant considerations were taken into account and what were the material facts which were taken into account. The Government was, therefore, bound to disclose in the affidavit what were the relevant considerations and what were the relevant facts which it had taken into account. As a matter of fact, the justification for the refusal of sanction on the denial of respondent-2 was one found by the learned Judge only on the records. Indeed, there is no clear statement in the affidavit that the rejection of the sanction was based

on the denial by respondent-2. If the Second Secretary had not found it necessary to rely on the denial of respondent-2, in the office noting, as being a ground on which the communication, dated 7th February, 1978, could be supported, it is not for the court to find support for the refusal of the sanction in the denial of respondent-2. If there is anything more apparent on this affidavit, it is that it suffers from extreme vagueness and reluctance to explain what were the circumstances and facts which were considered by the State Government. When we go to the affidavit of respondent-2, which has been read to us by Mr.Desabandhu, things seem to become worse for the Government. Respondent-2 has remained satisfied with saying that he does not remember what conversation he had with the correspondent of the Indian Express. But at the same time he says that he does not remember to have used the words ascribed to him in the news report and now complained of as amounting to a defamatory imputation. In the affidavit it is admitted that respondent-2 had conversation with the correspondent on the telephone. In that conversation, the petitioner's name was discussed and respondent 2 positively holds back information as to what exact conversation took place about his remarks about the time capsule. A link is, therefore, clearly established at least, *prima facie* with case news item which appeared on 24th August, 1977 and respondent-2. In the letter in which the petitioner asked for sanction, the petitioner had also stated that he had secured confirmation from Mr.Ramachandran that it was respondent-2, who had uttered those words. There was, therefore, a case which was put before the Government in the letter, dated 28th December, 1977 that the person under whose name the report appeared in which the said defamatory remarks were reproduced, had also confirmed to the petitioner that it was respondent-2, who had uttered those words. There is nothing in the affidavit to show that the Government had applied its mind to these circumstances. If the Government so chose, it could have called upon the petitioner to produce the confirmation. But such a statement made by a responsible officer of the Government could not be rejected outright. Indeed, there is nothing to show that it was rejected. The nature of the consideration which this letter has received is apparent from the office note which appears on record and of which a translation has been given to us. The file contains an opinion of the Law Secretary and in the final note which is put up, the following appears—

> "Whatever it might be, it is unnecessary to file a case like this even after the Chief Secretary to Government had written a letter explaining the correct position."

Admittedly, respondent-2 has not written any letter to the Government. In order to be sure that this translation which is given to us by the learned Advocate General was correct, we asked him again whether this was a correct translation and he did not dispute the translation. The records of the Government, therefore, show that what weighed with the Government was that the Chief Secretary to the Government had written a letter explaining the correct position. Admittedly, there is no such letter. If there is anything in the file, it is in the form of a note made by the Chief Secretary, namely, respondent-2 himself, denying that he ever said what was attributed to him. When the note said that there is no basis to file a case, it is obvious that this was based only on what was understood to be the explanation of the 'correct position', according to respondent-2.

21. If we read the return filed by the first respondent justifying the order of rejection of permission, there the stand taken in the return is that 'the words ascribed to the second respondent will not amount to defamation in the circumstances of the case.' Apart from the finding the learned Judge had recorded, it is difficult to accept as a proposition of law that, when somebody is charged with sabotage, it is not defamatory of the person so charged. 'Saboteur' is described in the dictionary as one who commits sabotage and the meaning of sabotage given in the Concise Oxford Dictionary is 'malicious or wanton destruction...commit sabotage on; destroy, render

useless..." The concept of sabotage implies clearly an evil intention to destory something and considering the fact that the charge of sabotage is made, it is obvious that when such a charge is made, the person charged is obviously alleged to have evil intentions of destroying something. We are, therefore, surprised that the State Government has taken the stand that the words attributed to the second respondent will not amount to defamation. The qualifying words 'in the circumstances of the case' do not improve matters. What these circumstances are, have not been explained anywhere and all that is available on record is that the circumstances of the case were that the petitioner had made some statements, which according to him, were justified and these statements were styled as intended by the petitioner to sabotage the services. The least that can be said about the view which the State Government has canvassed in the affidavit is that, it is an extremely unreasonable and wholly untenable view. If this was the consideration which the State Government had in mind when they rejected the application of the petitioner, it is obvious that the conclusion that the State Government did not think it proper to grant permission itself would become wholly unreasonable.

22. In paragraph 23 of the return, the State Government has taken the stand that the petitioner does not appear to realise that while he claims to have a right to vindicate himself, Government is also under a duty in exercise of its powers under the rule, to protect officers from unnecessary harassment through vexatious court proceedings. While it cannot be disputed that the Government has a duty towards its officers to protect them from unnecessary harassment through vexatious proceedings, this protection can be given only where the proceedings are likely to be vexatious which alone will result in harassment. If the proceeding intended to be taken by a Government servant is to vindicate his reputation which is sullied by a charge that he is sabotaging the services and a *prima facie* case is made out by the said officer, then the proposed proceedings cannot become vexatious. The real question which fell for consideration before the State Government was, whether there was *prima facie* material to show that respondent-2 made the statement which was clearly defamatory. If the statements imputed to respondent-2 were *per se* defamatory, then the only ground on which the permission could have been refused to the petitioner would be that there was *prima facie* no material to show that respondent-2 had made such a statement. If he had made a statement, the proceedings would not become vexatious. As already pointed out, the State Government has merely gone by the denial of respondent-2, which, however, looks infirm in the face of the stand which respondent-2 himself has taken in the affidavit which is filed in this Court. It is rather surprising that having admitted that respondent-2 had some conversation with the correspondent of the Indian Express and which obviously referred to the petitioner, respondent No.2 thought it fit to give only a one line reply that respondent-2 had no information to communicate to the petitioner on the subject. This was sought to be justified by respondent-2 in the affidavit in paragraph 10 by stating that the petitioner had not indicated who the Government spokesman was. This stand ignores the contents of the letter addressed by the petitioner on the very next day, on which the news item appeared enquiring as to who the Government spokesman was. It is not the case either of respondent-1 or respondent-2 in their affidavits, that apart from the respondent-2, any other person had any conversation with the correspondent of the newspaper, with regard to the remarks or the stand taken by the petitioner in respect of the time capsule on the 24th August, 1977, or at any time earlier. As a matter of fact, respondent No.2 admits that he had talked to the correspondent but his only case is, he does not remember what he said. This itself cannot rule out the possibility of respondent No.2 having said what is attributed to him. It is, therefore, difficult to appreciate the stand taken by the second respondent that he was under no obligation to disclose what he had conversed over the telephone with Mr.Ramachandran especially when the petitioner wanted to ascertain who had made the adverse remarks against him.

It is also surprising that, even till this day, neither respondent 2, nor respondent-1 has come out with a clear case that they have tried to make any enquiries as to who the Government spokesman was nor have they taken any definite stand that the Government spokesman referred to in the news item was not respondent 2. As it now transpires, it is difficult to appreciate the stand which is taken by respondent 2, that there was no duty case on him on receiving the petitioner's letter to investigate the matter, particularly with reference to a press item. Respondent 2 was at the material time Chief Secretary of the Government of Tamil Nadu and if any news item containing what purported to be the view of the State Government appears, in our view, it was obligatory on the State Government as well as on respondent-2, to ascertain from the newspaper management itself as to who was the Government spokesman. A Government spokesman always speaks for the Government and it would be extremely undesirable for any views to be published for public consumption as those of the Government, if the Government did not really hold those views or had not permitted the Government spokesman to make any statement. It is also, therefore, difficult to appreciate the stand taken in paragraph 13 of the return of respondent 2 where he states:-

> "....In as much as the news item did not contain the name of the Government spokesman and did not refer to me specifically, the question of my issuing a denial to the Indian Express did not arise..."

In the same paragraph, respondent-2 has as a matter of fact, admitted--

> "...some days before 25th August, 1977, Thiru Shastri Ramachandran phoned me up and asked about Thiru Badrinath's time capsule case. I said it was a disciplinary case pending..."

Therefore, a part of the news item which has appeared under the name of Mr.Ramachandran is obviously referable to the conversation which he had with respondent 2 and we are not prepared in this case to accept the half-hearted statement of respondent-2 that he does not remember what he spoke about the petitioner but he remembers that he did not make use of any damaging statement.

23. The present case, in our view, appears to be one in which a serious charge had been made against the petitioner of sabotaging the services, and he is entitled to vindicate his honour. The view which the State Government has taken that on a consideration of the materials and circumstances of the case, the State Government has decided to decline the permission is, in our view, wholly unwarranted and indeed a conclusion which no reasonable person would reach.

24. Though an argument was advanced before us by the learned Advocate General that Ramachandran's letter was not forwarded along with the letter for permission, the return of the State Government nowhere sets out this as a ground for rejecting the permission. It would have been a different matter if the State Government had taken a stand that if this letter was placed before the State Government along with the letter for permission, they would have considered the impact of the letter and may have reached a different conclusion. Raising this point merely at the stage of arguments does not cure the infirmity which appears from the stand taken in the affidavit. After giving our anxious consideration to the questions involved in this matter, we are satisfied that the only way in which the petitioner can have his honour vindicated is to take the matter to the court, where the controversy can be properly thrashed out.

25. We are unable to see how the refusal to grant permission is sought to be justified on the ground that public interest demands that an officer of the Government must inspire confidence not only among his fellow officers but also among the members of the public. If an officer is dubbed as one who has sabotaged the services, he must be regarded as one who is disloyal to the services and the public would also not trust such an officer, who is bound to lose his credibility. Even on

the ground of public interest, we think the petitioner appellant is entitled to have the sanction contemplated by Rule 17. Accordingly, we set aside the judgment of the learned Judge and quash the letter, dated 7th February, 1978.

26. When we indicated that we are inclined to quash the Government's letter, dated 7th February, 1978, the learned Advocate General very vehemently contended that the only proper order which can be passed is that the matter should go back to the State Government for reconsideration, because, according to the learned Advocate General the power under Rule 17 has been vested in the State Government, and if this Court grants permission, it will be performing the function which properly belongs to the State Government. It is not possible to accept this argument. The petitioner has been fighting this litigation for almost six years. We have indicated how the State Government's consideration of his letter of request for permission under Rule 17 has been vitiated, and we do not think that we will be exceeding our jurisdiction under Article 226 if we issue a Mandamus to the State Government to grant the appellant the necessary sanction as required by Rule 17. The refusal of the State Government to grant the sanction under Rule 17 must be considered as wrongful, and a wrongful refusal to exercise its discretion must be considered as a breach of duty which can be redressable by an order of Mandamus - (See Judicial Review of Administrative Action by De Smith, 4th Edn., page 534). Accordingly, a Mandamus will issue to the State Government directing it to grant sanction to the petitioner-appellant to have recourse to a Court of law to file a civil suit as he has asked. This shall be done by the State Government within a period of one month from today. No costs.

27. This order is dictated in the presence of the Government Advocate and we expect him to communicate our decision to the State Government. A steno copy of the judgment will be made available to the State Government immediately after it is signed.

B.S. — *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V. Ramaswamy and Sathiadev, JJ.*

*W.A.No.469 of 1979. 20*th February*, 1985.

Krishna Chettiar and others *Appellants**

v.

The Secretary, Harijan Welfare Department, Government of Tamil Nadu, Madras-9 and others *Respondents.*

Land Acquisition Act (I of 1894), sections 4(1), 5-A and 9(3) - Absence of notice of acquisition proceedings to registered cultivating tenants - Effect - Acquisition proceedings should be reopened from the stage of issue of section 9(3) notices.

The notice under section 9(3) is mandatory and forms an integral and essential part of the land acquisition proceeding. The occupier requires to be served. This mandatory requirement is with reference to the apportionment of compensation between the owner and occupier having certain rights as against them. Once by such an enactment, the legal status of a tenant is recognised and notified in the Gazette, the Land Acquisition Officer being a public authority is bound to take into account such notification in the Gazette. *[Para.6]*

It is no answer to claim that already the award has been passed. An illegality having been committed in non-issue of notices to persons whose names have found a place in the District Gazette published under Act X of 1969, it results in the acquisition proceedings being reopened from the stage of section 9(3) notices. *[Para.7]*

Cases referred to:-

Soma Singh v. Jaigobind Pande, A.I.R.1935 Patna 42; *Laxmanrao v. Govt. of Bombay*, A.I.R.1950 Bombay 334; *V.K.Durga v. District Collector*, A.I.R.1971 A.P.310.

V.Natarajan and *V.Nicholas*, for Appellants.

Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Sathiadev, J.:- The appellants claim to be cultivating tenants in respect of the lands acquired under Award No.7 of 1975, dated 20th May, 1975, of the Special Tahsildar, Harijan Welfare, Coimbatore. The appellants state that they have been the cultivating tenants under the fourth respondent for more than six decades and that they applied to the constituted authorities under Act X of 1969 to register themselves as cultivating tenants and it was published in the District Gazette on 20th September, 1972 and in Tamil Nadu Gazette on 27th September, 1972. They also rely upon the adangals issued from 1973 onwards to show that they have been cultivating the lands.

2. Learned Counsel for the appellants submits that being cultivating tenants, the appellants are interested in the acquisition proceedings and therefore, they ought to have been issued notices of section 4(1) notification and they ought to have been heard in the section 5-A enquiry, which was held on 19th February, 1972; and when notices were issued under sections 9 and 10 they were never intimated and they were in total darkness about the passing of the award and therefore, the entire acquisition proceeding is illegal and not binding on them. On coming to know that at the instance of the fourth respondent, the proceedings have gone through, they filed a petition on 23rd August, 1976, claiming that they are entitled to be heard in the acquisition proceedings. There was a reply to the effect that since the acquisition proceedings have already been concluded, resulting in possession being taken on 25th June, 1975, such a petition cannot be entertained. Aggrieved against that, they filed W.P.No.665 of 1977 and on its dismissal, this writ appeal is preferred.

3. Mr. V.Natarajan, learned Counsel for the appellants, submits that when the appellants have been in physical possession of the land and when they have also moved for registration of their names under Act X of 1969, the public authorities ought to have taken note of the said proceedings, and looked into these registers also to find out whether they are interested persons or not. He relies upon adangals issued from 1973 onwards, but is unable to produce any earlier adangal wherein the names of his clients are shown as the cultivating tenants. In the records produced by the State, the adangals for the years 1971, 1972 and 1973, do not show the names of the appellants as those cultivating the lands. Therefore, on 29th December, 1971, when section 4(1) notification was published, the authorities, being bound to look into the revenue records and having found only the names of the landowners, have not issued any notice to the appellants for the section 5-A enquiry held on 19th February, 1972. It is in or about that period, the appellants have sought for registration of their names as tenants, but the same was published in the District Gazette only on 20th September, 1972. By that time, section 5-A enquiry having been completed on 19th February, 1972, it cannot be said that there was any error committed in not issuing notices to the appellant. Therefore, the subsequent declaration under section 6 is not in any way vitiated.

4. On behalf of the State, it is claimed that they have taken possession of the lands on 25th June, 1975. This, they could achieve only by taking such possession as could have been given by the landowners. It is claimed by the appellants that they continue to be in possession, and for this purpose they rely upon a communication issued by the authorities in 1980, calling upon them to deliver possession, consequent to the interim orders passed pending the writ appeal having been vacated. It is this factor of appellants continuing to be in possession, which enables Mr. V.Natarajan, their counsel, to contend that they ought to have been served with notices under sections 9 and 10 of the Act, with reference to the apportionment of compensation, so that they could have claimed their share of compensation.

5. On behalf of the State, it is submit-

ted that not only the award has been passed, but also the compensation amount had been disbursed. The owner of the land, impleaded as fourth respondent, had also stated that though the award was passed on 20th May, 1975, since crops were in the lands, he sought for three months' time, and thereafter, actual possession has been taken, and the land in question was divided into building sites, and pattas have been issued to Harijan inhabitants on 14th June, 1976, and, thereafter, the appellants have come forward with false claims.

6. Under Act X of 1969, once a notification is published in the Gazette, recognising the appellants herein as cultivating tenants of the land in question, in the eye of law, their legal status cannot be anything differently understood. In para 2 of the affidavit, appellants have claimed that their names have been recorded by the Record Officer under Act X of 1969. A copy of the publication made is also filed in page 2 of typed set. The owner of the land refutes this claim in para.2 of the counter affidavit claiming that on verification of the records in the office of the Tahsildar, Coimbatore, for faslis 1380, 1381 and 1382, the names of the appellants are not included as tenants in tenancy records. He had not explained as to how the extract produced before Court could be disbelieved. He was not represented by counsel in the appeal. In the face of such an extract placed before court, the application made in the Gazette has to be necessarily acted upon, treating the appellants as tenants of the land. It is on this basis, appellants' counsel relies upon *Soma Singh v. Jaigobind Pande*, A.I.R.1935 Pat.42 to state than an occupancy raiyat in possession of a holding is entitled to a notice under section 9(3) and if not so served, he can question the correctness of the award. In *Laxmanrao v. Govt. of Bombay*, A.I.R.1950 Bom.334 a Division Bench of the Bombay High Court held that as far as occupiers are concerned, the Collector must serve a notice upon them and as far as persons interested are concerned, the obligation is cast upon him only if he knows of such persons or believes that there are such persons. As for occupiers, the obligation is absolute. In *V.K.Durga v. Dt. Collector*, A.I.R.1971 A.P.310 it was held that the notice under section 9(3) is mandatory, and forms an integral and essential part of the land acquisition proceeding, and that the occupier requires to be served. This mandatory requirement is with reference to apportionment of compensation between the owner and occupier having certain rights as against them. Once by such an enactment the legal status of a tenant is recognised and notified in the Gazette, the Land Acquisition Officer being a public authority is bound to take into account such notification in the Gazette. Under section 15 of Act X of 1969, any entry in the approved record of tenancy rights shall be presumed to be true and correct, until the contrary is proved or a new entry is lawfully substituted therefor. This being a legal presumption, pertaining to such entries, the Land Acquisition Officer is duty bound to look into the entries in such registers to find out whether such category of interested persons in relation to the land in question exists or not.

7. When even a member of the public cannot plead ignorance of publication of such notification in the Gazette, the Collector who conducts land acquisition proceedings can never be heard to claim that he was not aware of the contents either in the District Gazette or in the State Gazette. The appellants claim that the notification recognising them as cultivating tenants was published in the District Gazette on 20th September, 1972 and this was well to the knowledge of the third respondent, who must be conversant with the notifications made in the Gazette of that district. He has no excuse to plead that the owner had not apprised him. Interested in depriving others who are entitled to share the compensation amount with him, he would never disclose such particulars. That is the reason why a Gazette notification is made. The third respondent being a public authority, is duty bound to take into account such Gazette notifications. It is no answer to the claim that already the award has been passed. An illegality having been committed in non-issue of notices to persons whose names have found a place in the District Gazette published under Act X of 1969,

it results in the acquisition proceedings being reopened from the stage of issue of section 9(3) notices. On issue of notices to the appellants and the owner, if it be established before the third respondent that there was no such notification or the notification made had ceased to exist, or that appellants are not cultivating tenants, depending upon the merits of the matter, the award has to be passed. If in law it is found that appellants are entitled to compensation in their capacity as cultivating tenants; merely because the landlord has already drawn out the amounts, appellants cannot then be prevented from securing their compensation from the State. If wrongly the owner had drawn out the compensation, it will have to be recovered by the State independently, and that would not be a ground to deprive the appellants of their compensation, provided, they prove that they are cultivating tenants as claimed. It is also made clear that the acquisition proceedings are not reopened to enable the appellants herein to question the correctness of section 4(1) notification or section 6 declaration. The relief granted herein is only confined for consideration as to whether they are entitled to payment of compensation in their capacity as cultivating tenants and no other.

8. On behalf of the State, no material is placed before Court that appellants have been dispossessed after the communication was passed in 1980. Hence, till the revised award is passed, which is confined for determination of their rights to compensation, they cannot be dispossessed. Now that Land Acquisition Act has been amended, and the time available for completion of award enquiry being short, respondents 1 to 3 are to issue the necessary notice within one month from the date of the receipt of this order.

9. Hence, the order of the learned single Judge is set aside and the writ appeal is allowed. No costs.

B.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G. Ramanujam and M.A. Sathar Sayeed, JJ.*

*Original Side Appeal No.48 of 1985.
3rd May, 1985.

Satish Vishanji Futnani *Appellant**

v.

Mohanlal Dungarmal Futnani and others
Respondents.

(A) Indian Succession Act (39 of 1925) - Application for issue of Probate by the Executor a son of the deceased - Caveat by son of another son of the testator - Truth and Validity of the will disputed - Application converted into TOS - Caveator's son filing application for impleading himself in the suit - Claim based on independent title to the property - Petition dismissed - Held the petitioner had no caveatable interest.

(B) Hindu Succession Act (30 of 1956), sections 6 and 8 - Applicability.

The preponderance of judicial opinion is that a person claiming an independent title to a portion of the property covered by the will has no caveatable interest.
[Para.12]

In the present case admittedly the testator had left not only two sons but eight daughters. Therefore, in regard to the testator's interest in coparcenary property, it is the proviso to section 6 of the Hindu Succession Act that is applicable in this case and not the main provision. If the rule of survivorship does not apply to the coparcenary interest then, even if the deceased had died intestate, it is only section 8 that will have to be applied and under that provision, the caveator being a class I heir, he alone can claim an interest in the coparcenery property, if the deceased had died intestate the applicant will have no present interest whatever in the coparcenary property. Therefore he has to be taken to have

no sufficient interest in the coparcenary property. *[Para.14]*

Cases referred to:-

Jammi Hanumantha Rao v. Aratla Latchamma, (1926) 51 M.L.J.563: I.L.R.49 Mad.860: A.I.R.1926 Mad.1193; *Jayakumar v. Ramaratnam*, (1972)1 M.L.J.4: 85 L.W. 3: A.I.R.1972 Mad.212; *Rahmatullah Sahib v. Rama Rau*, (1894) I.L.R.17 Mad.373: *Rajamanikam v. Sarkar*, A.I.R.1923 Mad. 131; *Komalangi Ammal v. M.K.Sowbhagiammal*, (1930)59 M.L.J.529: I.L.R.54 Mad. 24: A.I.R.1931 Mad.37; *In re Last will and Codicil of Venkata Narasimha*, (1975)1 M.L.J.379: 88 L.W.253: A.I.R.1975 Mad.330; *M.K.Sowbagiambal v. Komalangi Ammal*, (1928)54 M.L.J.382= A.I.R.1928 Mad.803; *In the matter of the Petition of Bhobosoonduri Dabee*, (1881) I.L.R.6 Cal.460; *Ishwardeo Narain Singh v. Kamala Devi*, A.I.R.1954 S.C.280.

Appeal under Clause 15 of the Letters Patent and Order 36, rule 11 of the O.S.Rules 1956 against the Order of Mr.Justice Sengottuvelan dated 28-3-1985 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.211 of 1985 in T.O.S.19 of 1984, etc.

The Judgment of the Court was delivered by

Ramanujam, J.:- This appeal arises out of the judgment dated 28-3-1985 of Sengottuvelan, J. in Application No.211 of 1985 in T.O.S.No.19 of 1984, dismissing the same. The said application had been filed by the appellant herein to implead himself as second respondent in T.O.S.No.19 of 1984 and for directing the plaintiff to amend the plaint accordingly.

2. The facts leading to the filing of the said application by the appellant may briefly be noted: One Dungarmal Bachumal Futnani died on 1st April, 1983, leaving a will and a codicil dated 28th June, 1982 and 29th March, 1983 respectively. He has left behind him two sons and eight daughters. The sons are Mohanlal D.Futnani and Vishanji Futnani. The wife of the deceased predeceased him. The first respondent herein, Mohanlal D. Futnani filed O.P.No.262 of 1984 for the issue of a probate in respect of the will claiming to be the named executor under the will. In the said O.P.No.262 of 1984 the son of the first respondent, viz., the second respondent herein, also figured as the second petitioner. The other son of the testator viz., the third respondent herein, filed a caveat and disputed the truth and genuineness of the will. Hence, the above said O.P. was converted into T.O.S.No.19 of 1984. The properties dealt with by the said will and codicil of the deceased are situate in Madras, Bombay and Calcutta, known as "Futnani Chambers". The appellant herein, as already stated, filed Application No.211 of 1985 for impleading himself as second respondent in T.O.S.No.19 of 1984 on the ground that he is a necessary party to the said T.O.S. In the affidavit filed in support of his application, he has stated the following two grounds to substantiate his contention that he is a necessary party to the suit:-

(1) that he is the son of the caveator and the grand-son of the testator; and
(2) that he owns a share in "Futnani Chambers" which is one of the items covered by the will and as such he has got sufficient interest in the property and to oppose the will.

The said application for impleading was opposed by respondents 1 and 2 herein on the ground that the appellant had no caveatable interest and as such, he has no *locus standi* to figure as a party in the T.O.S. and that in any event, it is only the father of applicant, who may claim an interest in the said property and as such, the applicant has no present interest in "Futnani Chambers" in respect of which he claims to have a share and that even if the applicant is found to own a fractional share in "Futnani Chambers" that will not entitle him to figure as a party in the T.O.S., since the interest claimed by him is independent of the testator. After considering the rival contentions, Sengottuvelan, J. has held that as the applicant claims to be a joint owner in "Futnani Chambers" in Calcutta along with the deceased, he has no *locus standi* to get himself impleaded in the

suit. In that view, he dismissed the application for impleading filed by the appellant, by his order dated 23rd March, 1985. The correctness of the said order of the learned Judge is being challenged in this Appeal.

3. Before us, Mr. V.P.Raman, the learned counsel for the appellant puts foward the following three grounds as entitling the appellant to implead himself as a party-defendant in the T.O.S.:

(1) that the appellant is the grand-son of the testator and not a stranger and that but for the interception of the will, he will succeed to the estate of the deceased along with other heirs;
(2) that he is co-owner along with the deceased in the property known as "Futnani Chamber" in Calcutta, which is one of the items covered by the will and therefore, he has got sufficient interest in the estate of the deceased to come into the picture as a second defendant in the suit; and
(3) that the contesting respondents herein who had applied for the probate having admitted in the affidavit of assets filed before this Court on 17th June, 1984 that an investment of Rs.81,115/- in Navabharath Trading Corporation on behalf of the Hindu undivided family, has been made the applicant will have interest in the said admitted Hindu undivided family property but for the will and therefore, the appellant should be taken to have got sufficient interest to implead himself as the second defendant in the suit.

4. So far as the first contention is concerned, it is not in dispute, that the appellant is the son of the caveator and the grand-son of the testator. However, so long as the caveator is alive, his son, the appellant, cannot be claimed to be an heir at law, even if the deceased had died intestate. Under section 8 of the Hindu Succession Act, it is only the son who can claim to succeed to the father as Class I heir and the grand-children of the deceased cannot claim to be class I heirs. Therefore, the fact that the appellant is a son of the caveator and a grand-son of the testator will not clothe him with a caveatable interest.

5. Coming to the second ground, it is not in dispute that the interest claimed by the appellant is only as a co-owner of one of the properties covered by the will viz., "Futnani Chambers" in Calcutta. When once the appellant claims interest as a co-owner along with the testator in respect of the property, that claim should be taken to be independent of the testator and not through the testator. The question is whether a person who claims a title independent of the testator in the properties covered by his will can be said to have a caveatable interest, so as to enable him to contest the will by becoming a party-defendant in the suit.

6. Mr. Raman, learned counsel for the appellant, relied on the Bench decision in *Jammi Hanumantha Rao v. Aratla Latchamma*, (1926)51 M.L.J.563. I.L.R.49 Mad.960= A.I.R.1926 Mad.1193 and the decision of a single Judge in *Jayakumar v. Ramaratnam*, (1971)1 M.L.J.4= 85 L.W.3= A.I.R.1972 Mad.212 in support of his plea that even if the claim put forward by the appellant is independent of the testator and not through him, he is entitled to come into the picture. In *Jammi's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 the court observed that

> "The true principle deducible from the cases is that a person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of section 69 of the Probate and Administration Act. It is not necessary that he should claim through the testator in order to enable him to oppose that grant of probate of the will of the testator. If a person is likely to suffer by the grant of the probate of a forged will or an invalid will he has sufficient interest to enter a caveat."

The said decision has been followed by Maharajan, J. in *Jayakumar's Case*, (1972)1 M.L.J.4= 85 L.W.3= A.I.R.1972 Mad.212 wherein he held that section 283(1)(e) of the Indian Succession Act is intended to give the widest possible publicity to the probate proceedings and to give an

opportunity to any person having the slightest and even the bare possibility of an interest in the proceedings to challenge the genuineness of the will and place before the Court all the relevant circumstances before a grant *in rem* is made in favour of the person claiming the probate.

7. The learned Counsel for the contesting respondents, however, referred to a catena of decisions beginning from the decisions in *Rahmatullah Sahib v. Rama Rau*, (1894) I.L.R.17 Mad.373, *Rajamanikam v. Farkar*, A.I.R.1923 Madras 131, *Komalangi Ammal v. M.K.Sowbhagiammal*, (1930) 59 M.L.J. 529= I.L.R.54 Mad.24= A.I.R.1931 Mad.37, *In re Last Will and Codicil of Venkata Narasimha*, (1975)1 M.L.J.379= 88 L.W.253= A.I.R.1975 Mad.330, all of which were Division Bench decisions taking a contrary view to the view expressed in *Jammi's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad. 960. In *Rahmatullah's Case*, (1894) I.L.R.17 Mad.373, Muthuswami Ayyar and Best, JJ. held that

> "In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest.".

The judges in that case have proceeded on the basis that a person claiming an interest independent of the testator to some of the properties covered by the will cannot contest the will.

8. In *Rajamanikam's Case*, A.I.R.1923 Madras 131, another Division Bench consisting of Ayling and Odgers, JJ., approved the dictum laid down by the Division Bench in *Rahmatullah's Case*, (1894) I.L.R.17 Madras 373 and held that

> "Before a person can be permitted to contest a will, the party propounding it, has a right to call upon him to show that he has some interest. A bare possibility is sufficient provided it rests on existing facts, but the possibility of filling a caveat which would give the party concerned an interest is not sufficient, there must be a possibility of having an interest in the result of setting aside the will."

9. The decision in *Jammi's Case*, (1926) 51 M.L.J.563, which is relied on by the learned counsel for the appellant does not refer to the two earlier Bench Decisions in *Rahmatullah's Case*, (1894) I.L.R.17 Mad.373 and *Rajamanikam's Case*, A.I.R. 1923 Mad.131.

10. In *M.K.Sowbagiambal v. Komalangi Ammal*, (1928) 54 M.L.J.382= A.I.R.1928 Mad.803, Venkatasubba Rao, J. sitting singly expressed a doubt as to the correctness of the decision rendered in *Hanumantha Rao's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 with the following observation:

> "I have said there has been of late a tendency at the bar, to treat the rule I have stated as open to question, and support is sought in certain observations of a Bench of this Court in a recent case, *Hanumantha Rao v. Lakshmamma*, (1926) I.L.R.49 Mad.960= 51 M.L.J.563 but I am sure I shall not be wrong if I assert (and I do so with some confidence) that the learned Judges could not have intended by their dicta to cast a doubt on a long settled practice sanctioned in a series of judgments of great authority."

after holding that in every case it must be shown that the caveator, but for the will, would be entitled to a right, of which that will deprives him, and that is the long settled practice sanctioned in a series of judgments of great authority. This Judgment of Venkatasubbarao, J. has been affirmed in *Komalangi Ammal*, (1930) 59 M.L.J.529= I.L.R.54 Mad.24 by a Division Bench of Ramesam and Cornish, JJ. In the said decision reliance was placed on the Division Bench decision in *Jammi's Case*, (1926) 51 M.L.J.563= I.LR.49 Mad.960 over which doubt has been expressed by the learned single Judge, whose judgment was under appeal. The Bench after referring to the said decision felt that the judgment follows the decision on the Calcutta High Court in *In the matter of*

the Petition of Bhobosoondun Dabee, (1881) I.L.R.6 Cal.460, which has not been followed even in the Calcutta High Court ever since and therefore, it is unnecessary for them to say whether *Jammi's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 was decided correctly or not and that it is sufficient to say that they are not agreeing with the observations contained in that judgment. In that case, the Court clearly laid down that if a person sets up title adverse to the testator's title to the property, it is impossible to say that he has an interest in the deceased's estate and the adjudication of the question of title being foreign to the proceedings of Probate, such person cannot be allowed to enter a caveat.

11. *Venkata Narasimha's Case*, (1975)1 M.L.J.379= A.I.R.1975 Mad.330 is also a decision of a Division Bench, wherein it has been held that the decision of Maharajan, J. in *Jayakumar's Case*, (1972)1 M.L.J.4= 85 L.W.3= A.I.R.1972 Mad.212 which in turn follows the decision of the Division Bench in *Jammi Hanumantna Rao v. Aratla Latchamma*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 has not been correctly decided and that the scope of the probate petition is confined to an enquiry as to the disposing state of the mind of the testator and the disposition of the property by will and any caveat entered into will also be confined to the scope of the position and that a person who claims interest in the estate of the testator will have the *locus standi* to maintain the caveat, and that a proceeding for issue of probate cannot be and should not be allowed to be converted into a suit for resolving disputed title to any of the properties covered by the will. The learned Judges also referred to the decision of the Supreme Court in *Ishwardeo Narain Singh v. Kamala Devi*, A.I.R.1954 S.C.280 where the following observation has been made by the Supreme Court:

> "The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of deceased person, was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court."

12. Thus, the preponderance of judicial opinion is that a person claiming an independent title to a portion of the property covered by the will has no caveatable interest.

13. The learned Counsel for the appellant would say that even if the preponderance of the judicial opinion is one way, since the Division Bench has taken the contrary view in *Jammi Hanumantha Rao v. Aratla Latchamma*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 the proper course is to have the conflict resolved by referring to a Fuller Bench. However, here, even before *Jammi's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad. 960 there have been two decisions of Division Benches taking contrary view viz., in *Rahmatulla's Case*, (1894) I.L.R.17 Mad.373 and *Rajamanikam's Case*, A.I.R. 1923 Mad.131, which have not been referred to in *Jammi's Case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 and two later Bench decisions in *Komalangi Ammal's Case*, (1930) 59 M.L.J.529= I.L.R.54 Mad.24 and *Venkata Narasimha's case*, (1975)1 M.L.J. 379 taking a contrary view after refferring to *Jammi's case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960. As pointed out in *Komalangi Ammal's case*, (1930) 59 M.L. J.529= I.L.R.54 Mad.24 the learned Judges in *Jammi's case*, (1926) 51 M.L.J. 563= I.L.R.49 Mad.960 rested their decision on the basis of a judgment of Calcutta High Court in *Dabee's Case*, (1881) I.L.R.6 Cal.460, which decision has not been followed even in the Calcutta High Court in later decisions. In the light of these facts, we are of the view that this is not a fit case for being referred to fuller Bench as the Bench decision in *Jammi's case*, (1926) 51 M.L.J.563= I.L.R.49 Mad.960 has been referred to, but not followed by the later Bench Decisions in *Komalangi Ammal's case*, (1930) 59 M.L.J.529= I.L.R.54 Mad.24 and *Venkata Narasimha's Case*, (1975)1 M.L.J.379= A.I.R.1975 Mad. 330. In this view of the matter, we have to reject the appellant's second contention following the view expressed by at least four Division Benches of this Court

in *Rahmatulla's Case*, (1894) I.L.R.17 Mad. 373, *Rajamanikam's Case*, A.I.R.1923 Mad. 131, *Komalangi Ammal's case*, (1930) 59 M.L.J.529= I.L.R.54 Mad.24 and *Venkata Narasimha's case*, (1975)1 M.L.J.379= A.I.R.1975 Mad.330.

14. Coming to the third ground, it is not in dispute that in the affidavit of assets filed by the petitioner for probate, a sum of Rs.81,115 is referred to as belonging to the joint family and 1/3rd share therein belonged to the deceased. The question is whether the appellant has sufficient interest in the deceased's 1/3rd share in the coparcenary property so as to enable him to contest the will. Section 6 of the Hindu Succession Act deals with devolution of interest in the coparcenary property. That section is as follows:

> "6. *Devolution of interest in coparcenary property*:- When a male Hindu dies after the commencement of this Act, having at the time of his death, an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the members of the coparcenary and not in accordance with this Act.
>
> Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

The learned counsel for the appellant would say that in view of section 6 of the Act, the deceased's interest in the coparcenary property will devolve by survivorship upon the surviving members of the coparcenary, if the deceased had died intestate the appellant, who is the son of the caveator, will have his share augmented as a result of the rule of survivorship and therefore, he has got sufficient interest in the admitted coparcenary property. The learned counsel for contesting respondent would, however, rely on the proviso to section 6 which shows that if the deceased had left behind him surviving a female relative specified in class I of the schedule, the interest of the deceased in the coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. In this case, admittedly, the testator had left not only two sons but eight daughters. Therefore, it is the proviso to section 6 that is applicable to this case and not the main provision. If the rule of survivorship does not apply to the coparcenary interest, then, even if the deceased had died intestate, it is only section 8 that will have to be applied and under that provision, the caveator being the Class I heir, he alone can claim an interest in the coparcenary property, if the deceased had died intestate the applicant will have no present interest at all even in the coparcenary property. Therefore, he has to be taken to have no sufficent interest at present even in the coparcenary property.

15. As a result of the above discussion, we hold that the order of the learned trial Judge does not call for any interference. The appeal, is, therefore, dismissed with costs. Counsel's fee Rs.500/-.

16. Learned counsel for the appellant makes an oral application for the grant of leave to appeal to the Supreme Court against the judgment just now pronounced and also for stay of further proceedings in TOS pending the appeal before the Supreme Court. But having regard to the fact that the questions that came up for consideration before us are already covered by at least four division bench decisions of this Court we do not think that this is a fit case for the grant of leave to appeal to the Supreme Court. The oral application for grant of leave is therefore rejected.

17. In view of the rejection of the request for leave to appeal the request for stay cannot be granted.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S. Ratnavel Pandian, J.*

*Writ Petition of 1983 (S.R.No.147800).
27th June, 1984.

K.Rajendran *Petitioner**

v.

The Government of Tamil Nadu represented by the Secretary to Government, Commercial Taxes and Hindu Religious Endowments, Madras and others
Respondents.

Constitution of India (1950), Article 226 - Issuance of Mandamus to direct inter alia the Government of Tamil Nadu to declare that the Sankaracharyas of Kamakoti Peetam, Kanchipuram are not Jagatguru Sankaracharyas sought - Writ petition not maintainable.

Held: From the principles laid down in the reported decisions that in a case like the present one, in order to find out whether there is the existence of any office attached with the duty or duties which the office-holder is under a legal obligation to perform and the non-performance of which may be visited with penalties such as suspension, dismissal etc., voluminous evidence, both oral and documentary, under various heads, *viz.*, historical, administrative, financial etc., and on the religious and ritual aspects, and about observances, ceremonies and modes of worship which are integral part of religion, custom, long usage, etc., has to be let in and considered, which are all not matters which can be gone into in detail on a mere affidavit in a writ petition. The existence of a right which is available to the petitioner has not been made out, nor has it been established that there is a duty on the part of the Government to declare a particular person as Sankaracharya or not. For exercising such a duty, it must be cast on the Government or any authority either under a statute or under the general law. The Tamil Nadu legislation dealing with religious endowments does not contain any provision for issuing such a direction. The Hindu Law also does not contain any requirement in this behalf. Moreover, the facts set out in the affidavit, do not make out a case of violation of any duty or duties attached to any office. Hence the present writ petition is not maintainable as no legal right of the petitioner is shown to have been infringed and the Government is not shown to be under a duty to make a declaration as prayed for so that the omission to exercise that power can be made good in these proceedings. *[Para. 15]*

Cases referred to:-

Madhusudan Parvat v. Shri Madhav.Theerth, (1909) 11 Bom. L.R. 58 : (1909) I.L.R. 33 Bom. 278; *Sri Sinna Ramanuja Jeer v. Sri Ranga Ramanuja Jeer,* (1962) 1 S.C.J. 17 : (1962) 1 M.L.J. (S.C.) 1 : (1962) 1 An.W.R. (S.C.) 1 : (1962) 2 S.C.R. 509 : A.I.R. 1961 S.C. 1720; *Vathiar Venkatachariar v. Ponappa Ayyengar,* (1918) 45 I.C. 959 : 7 L.W. 614; *Sunshine Company v. Chief Controller of Imports and Exports,* A.I.R.1979 Mad. 191; *G.T. Venkatasamy Reddi v. State of Tamil Nadu,* (1979) 1 M.L.J. 382 : A.I.R. 1979 Mad. 261; *S.P. Gupta v. Union of India,* (1981) Supp. S.C.C. 87 : A.I.R. 1982 S.C. 149.

A.R. Jagadeesan, K.P.H. Thulasiraman, P.Rajamanickam and *M. Ramamoorthy,* for Petitioner.

The Court made the following

ORDER:- This unnumbered writ petition has been filed by one Rajendran, seeking the issuance of a writ of *mandamus* or any other appropriate writ or order in the nature of writ, directing the Government of Tamil Nadu, represented by the Secretary to Government, Commercial Taxes and Hindu Religious Endowments, *viz.*, the first respondent, to declare that respondents 2 to 4, *viz.*, Sri Swaminathan alias Chandrasekharendra Saraswathi, the Sankaracharya of Kamakoti Peetam, Kanchipuram, Sri Venkataraman alias the Junior Sankaracharya of Kamakoti Peetam, and Sri Narayanan alias the Sub-Junior Sankaracharya of Kamakoti Peetam, are

not the Jagatguru Sankaracharyas, and to pass such further orders as the Court may deem fit.

2. The averments made in the affidavit filed in support of the writ petition are briefly as follows: In the 8th century A.D., Aadi Sankara of Kaladi established four Sankara Maths based on the four Vedas in four places, viz., the Jyothi Math in the Himalayas (Badri) in the North, the Govardhan Math at Puri in Cuttack in the East, the Sharada (sic, Kalika) Math at Dwaraka in Gujarat in the West and the Shringeri (sic. Sharada) Math at Shringeri in the South. Each of these Maths was given exclusive jurisdiction over the then provinces (now the States surrounding the Maths). The Sankaracharyas of these Maths were enjoined to minister to the spiritual, theological, religious and social needs of the congregations within their respective jurisdictions and also given rights to call for and receive pecuniary and other offerings from the people in their charge. The Shringeri Math Acharya is entitled to and is in enjoyment of the above said status, style and position of Sankaracharya and all rights, title, privileges and dignities appurtenant to the gaddi of Shringeri Math, which has exclusive jurisdiction over the southern States including Tamil Nadu and Andhra. The four preceptors of the second respondent from 1814 and after them second respondent herein have fraudulently assumed the title of Sankaracharya of Kumbakonam, which was later rechristened as Kanchi Kamakoti Peetam in 1942. This Peetam is not one of the four Maths established by Aadi Sankara. Under this assumed title, respondents 2 to 4 call for and receive pecuniary and other offerings from the people at several places in the southern States which are exclusively within the jurisdiction of the fifth respondent, viz., the Jagatguru Sankaracharya of Shringeri Math at Shringeri in Karnataka State, to the serious detriment of the fifth respondent and to the derogation of the status, style and dignity of the Sankaracharya of the said Shringeri Math.

3. The Sankaracharya of Shringeri Math established branches at Kanchipuram, Madras, Rameswaram and other important religious centres in Tamil Nadu. There are branches (1) near the Mallikarjuna Temple in Linghi Chetty Street, Madras, (2) adjoining the *sanctum sanctorum* of Meenakshi Amman Temple at Madurai, and (3) adjoining the compound wall of Ramanathaswami Temple at Rameswaram. The archakas (priests) of Ramanathaswami Temple have to get the approval of the Shringeri Math even today for their appointments and the temple sends umbrellas and other presents to the Shringeri Math branch even to this date. All these facts confirm that the Shringeri Math is the acknowledged Math in the South established in Tamil Nadu. The branch maths established by Kanchi Acharya are quite removed from the temples aforesaid and these buildings are of very recent origin, whilst the buildings of the branch maths established by Shringeri Math are very old. Further, all the aforesaid four Maths have their Mathamanayas in Sanskrit, whilst the Kanchi Maths has no such amanaya. The fact that Aadi Sankara established four maths in spoken to by the High Courts of Patna and Bombay and the Supreme Court in their judgments whereby it is established that the Kanchi Kamakoti Math is not a recognised Math.

4. All the above four Maths have categorically refused to recognise the Kanchi Kamakoti Math. The pandits of Varanasi (Banaras) have passed a resolution in 1886 denouncing the Kanchi Math as a bogus and pseudo one. The ruling pontiff of Kanchi math (the second respondent herein) claims to be the 68th pontiff in a long line of succession to the Math known as Kumbakonam math. The fact remains that this Math originally called the Kumbakonam Math was founded in 1814 with Chandrasekhara-I as its pontiff. He was succeeded by Chandrasekhara-II and Chandrasekhara-III in 1891 and 1897 respectively and by Madhava in 1907. The fourth pontiff Madhava occupied the gaddi for only seven days and died of small pox leaving the gaddi vacant for the second respondent to occupy it on 9.5.1907. There is thus an attempt to attribute a hoary past to the Kanchi Math. The third and fourth respondents are the nominees to succeed the second

respondent in that order. The book *Jagatguru Divya Charitram* by Sambamurthi Sastrigal, the brother of the second respondent, in 1957, bears testimony to the above. Sankaracharya's is a high religious office with quasi-judicial functions on questions of religion, law and rituals in the Hindu society and the organisation of the four maths with exclusive jurisdictions was necessary to prevent conflicts of authority and jurisdiction. Further, no sanyasi (ascetic) can accept pecuniary gifts unless he is a Sankaracharya. The name "Sankaracharya" means "Preceptor Sankara" which originally belonged to Adi Sankara. After his death, the heads of the four maths have adopted the said name as a title. Respondents 2 to 4 being not entitled to the style and privileges of Sankaracharya for the reasons stated in the affidavit, their act in assuming the same is fraudulent and wrongful. Respondents 2 to 4 have disturbed and interfered with the office of the fifth respondent. Adi Sankara, in his last literary works, had denied God and decried Varnasrama, wearing of caste marks, idol worship, etc., But, respondents 2 and 3 are idol worshippers encouraging Varnasrama Dharma. Respondent-2 has dedicated his life the perpetuation of Varnasrama Dharma and established trusts for helping indigent Brahmin families, especially of the Smartha sect to perform the sacred-thread ceremonies and has been promoting group yagnopaveetha every year. He has also laid stress on the initiation of Brahmin boys to Brahmacharya at a very early age and on the child marriage of girls in their community.

5. The second respondent had influenced the then British Government and got himself appointed the sole trustee of Kamakshi Amman Temple in Kanchipuram in November, 1942, and after such appointment, the Kumbakonam Sankaracharya assumed the title of Kanchi Kamakoti Peethathipathi. Kanchi Math did not exist till 1942. There was the Kumbakonam Math till then and it was rechristened as Kanchi Math after 1942. The Kanchi Math is a pseudo and bogus math promoted by Smartha Brahmins in 1814 and not founded by Adi Sankara. It is a fraud on Hinduism, pure and simple. The petitioner has also alleged that though the title 'Jagadguru' implies that he is the Guru for all the Hindus' the nomination of successors to the math by the second and third respondents belies the title, proving that Sankaracharya is the Guru for the Smartha Brahmins only. The second respondent has nominated the third respondent to the gaddi and the third respondent has recently nominated the fourth respondent as the Junior Sankaracharya, and they have done so for the purpose of making an assurance for the dominant Brahmin community for two generations. The Shringeri Sankaracharya is still the accredited Sankaracharya for the South and the Kanchi Math has encroached on the rights and privileges of the Shringeri Math (5th respondent). When the second respondent undertook journey to the north in 1919, the Pandits of Varanasi refused to recognise him as the Sankaracharya. The second respondent has taken active part in Tamil Nadu politics and has encouraged the formation of the R.S.S. organization in Tamil Nadu and has promoted his own community men to organise the Hindu Munnani, the Vishwa Hindu Parishad and the like to counter the reservation policy of the Government intended for the development of the Backward Classes. The second and the third respondents are vehemently opposing these reservations made communitywise. The second respondent has in his treatise 'Deivathin Kural' (Voice of God), has written lauding the division of the Hindu Society into four Varnas, *viz.*, Brahmana Kshatriya, Vysia and Shudra, and as a natural corollary, the fifth estate Panchama and the need for the observance of the various Dharmas laid down in the scriptures, smrithis, shastras, etc., laying emphasis on the existence of these artificial divisions. The second respondent wants untouchability to continue in breach of Article 17 of the Constitution of India. Instead of taking suitable measures, the Chief Minister, the Minister for Hindu Religious and Charitable Endowments and other Ministers have participated in the Hindus (Indian) Religious Conference held in Madras in April, 1983, and thereby put their seal of approval for the communal activities of these Shankaracharyas, especially the third respondent herein.

As no other remedy against the action of the State Government according recognition to the pseudo and bogus Kanchi Math by their approval in appointing and continuing the pontiff of the Kanchi Math as the sole trustee of Kamakshi Amman Temple, Kanchipuram, and encouraging the second and the third respondents conducting the Hindu Conference by active participation in it by the Chief Minister and other Ministers, this writ petition is filed before this Court for the relief sought for therein.

6. This unnumbered writ petition has been listed before me to decide the maintainability or otherwise of this writ petition.

7. Mr. A.R. Jagadeesan, learned Counsel appearing on behalf of the petitioner, took me through the averments made in the affidavit and contended that this writ petition is maintainable in view of the past and present circumstances that this Kanchi Math should not be kept in charge of a public place of worship and as the Government of Tamil Nadu has a duty to declare that respondents 2 to 4 are not entitled to the style, status and dignities of a Sankaracharya.

8. This writ petition is filed under Article 226 of the Constitution of India praying for the issue of a writ of *mandamus* or any other appropriate writ or order directing the Government of Tamil Nadu "to declare that the respondents 2 to 4 are not Jagadguru Sankaracharyas". Besides, there is also a prayer for an injunction "to injunct the respondents 2 to 4 from continuing to adopt the style, status and the dignities of a Sankaracharya pending disposal of the above writ petition and thus render justice". It is to be noted here that no prayer is asked for against the fifth respondent. On the other hand, a reading of the affidavit of the petitioner would show as if the fifth respondent's rights and privileges are infringed upon by respondents 2 to 4 and therefore the petitioner wants to espouse the cause of the fifth respondent. The only question that arises for my consideration is whether the facts set out in the affidavit would make out a case for entertaining the writ petition seeking the issue of a writ of *mandamus*, which is a high prerogative writ designed to compel an authority to do his or its duty. In this connection, I would like to refer to certain decisions touching on this question.

9. In *Madhusudan Parvat v. Shri Madhav Theerth*, (1909) 11 Bom. L.R. 58 : I.L.R. (1909) 33 Bom. 278. The facts of that case were as follows: The plaintiff, the Shankaracharya of the Sharada Math at Dwaraka, sued for a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people of Ahmedabad or other places in Gujarat either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jotir Math or of a branch of that Math, and for an injunction restraining the defendant from styling himself as a Shankaracharya in Gujarat or from claiming or receiving offerings in Gujarat as a Shankaracharya or as a Sankaracharya of the Jotir Math or of a branch of that Math. It was held that the suit was not of a civil nature such as the Court would entertain. It was observed in that case as follows: (*vide* head-note):

> "The office of Mohunt of the Sharada Math is in no way endangered by the defendant's action in claiming to be a Shankaracharya of the Jotir Math, nor are voluntary offerings made to Shankaracharyas in Gujarat fees claimable as of right by the holder of the plaintiff's office. For interference with a mere dignity or voluntary offerings no suit can be maintained. Civil Courts will not decide disputes as to precedence or privilege between purely religious functionaries nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with."

10. In *Sri Sinna Ramanuja Jeer and others v. Sri Ranga Ramanuja Jeer and another*, (1962) 1 S.C.J. 17 : (1962) 1 M.L.J. (S.C.) 1 : (1962) 1 An.W.R. (S.C.) 1 : (1962) 2 S.C.R. 509 : A.I.R. 1961 S.C. 1720, which related to two suits

instituted by the Aradanaikar and Trustee of the Emberumanar temple, dedicated to Sri Ramanujacharya, which was one of the group of temples built around the main temple to Athinathalwar in Tirunelveli District, for declaration of his right to the first theertham and other honours and perquisites in precedence over all other worshippers in the temple of Athinathalwar, it was held that although it was not permissible under section 9 of the Civil Procedure Code, for a Civil Court to entertain a suit for a declaration of religious honours and privileges simpliciter, it could entertain a suit to establish one's right to an office in a temple and to the honours and privileges attached to such office as its remuneration and perquisites, and laid down the law that the essential condition for the existence of an office is that the holder of the alleged office shall be under a legal obligation to discharge the duties attached to the said office and for the non-observance of which he may be visited with penalties.

11. In the above decision, reference is made to the observations made by Krishnan, J., delivering the leading judgment in *Vathiar Venkatachariar* v. *Ponappa Ayyengar*, (1918) 45 I.C. 959, 961, 962 : 7 L.W. 614, which was a decision rendered by a Division Bench of this High Court. In that case, the Court had to consider the question of a claim to a religious honour which consisted of receiving theerthams and prasadams in the temple in certain order of precedence. The learned Judge observed thus:

> "It is clear that to constitute an office, one, if not the essential, thing is the existence of a duty or duties attached to the office which the officer-holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as a suspension, dismissal, etc."

12. A Division Bench of this Court in *Sunshine Company* v. *Chief Controller of Imports and Exports, New Delhi*, A.I.R. 1979 Mad. 191, has laid down the law with regard to the right of invoking the extraordinary jurisdiction of this Court seeking a writ of *mandamus*, as follows:

> "Only if there is a violation of public duty by a public officer in the normal discharge of his duties, a writ of *mandamus*, which is an extraordinary remedy, will be issued."

13. In yet another decision rendered by a Division Bench of this Court, to which I was a party, *viz.*, in *G.T. Venkatasamy Reddi* v. *State of Tamil Nadu*, (1979) 1 M.L.J. 382 : A.I.R. 1979 Mad. 261, it has been observed as follows:

> "It is by now settled that the applicant who seeks for a writ of *mandamus* should have a legal right to the performance of a non-discretionary legal duty by the person against whom a writ is sought. Even so, the right must be a public right and the duty to be enforced is of a public nature. An element of compulsion to perform the legal duty should be apparent on the record. The purpose of the writ is to compel action and not to undo what has been done. In all cases in which such an issuance is requested for, there should be a statutory duty on the part of the other party to be performed. In other words, it should be incumbent on the part of the other party to perform the duty and then only a writ of *mandamus* which is a high prerogative writ could be granted as it cannot otherwise be granted as a matter of course."

14. It is relevant, in this connection, to refer to the decision of the Supreme Court in *S.P.Gupta* v. *Union of India*, (1981) Suppl. S.C.C. 87 : A.I.R. 1982 S.C. 149 at 194, wherein it has been ruled that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some of the provisions of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.

15. Thus, from the principles of law laid

down in the above decisions, it is clear that in a case of this nature, in order to find out whether there is the existence of any office attached with the duty or duties which the office-holder is under a legal obligation to perform and the non-performance of which may be visited with penalties such as suspension, dismissal, etc., voluminous evidence, both oral and documentary, under various heads, viz., historical, administrative, financial, etc., and on the religious and ritual aspects, and about observances, ceremonies and modes of worship which are integral part of religion, custom, long usage, etc., has to be let in and considered, which are all not matters which can be gone into in detail on a mere affidavit in a writ petition. In fact, after hearing the learned Counsel for the petitioner at length and after carefully going through the averments made in the affidavit filed in support of the writ petition, I am of the view that the existence of a right which is available to the petitioner has not been made out, nor has it been established that there is a duty on the part of the Government to declare a particular person as Sankaracharya, or not. For exercising such a duty, it must be cast on the Government or any authority either under a statute or under the general law. The Tamil Nadu legislation dealing with religious endowments does not contain any provision for issuing such a direction. The Hindu Law also does not contain any requirement in this behalf. Moreover, the facts set out in the affidavit, in my view, do not make out a case of violation of any duty or duties attached to any office which respondents 2 to 4 are under legal obligation to perform. Hence, I hold that no writ will lie for the relied asked for.

16. In paragraph 17 of the affidavit, the reason given by the petitioner for impleading the fifth respondent, is that "the Shringeri Sankaracharya, whose rights have been encroached upon, is impleaded as the fifth respondent herein". It is not explained why the petitioner should espouse the cause, if any, of the fifth respondent, especially when the petitioner does not show that he is a person affected by the alleged encroachment of the rights and privileges of the fifth respondent. A careful reading of the affidavit would show that the prayer in the petition is substantially moulded on the line of the prayer in the Bombay decision in *Madhusudan Parvat v. Shri Madhav Theerth*, (1909) 11 Bom. L.R. 58, wherein the Bombay High Court has held that a suit could not be entertained. While it is so, a fortiori a writ will not lie for such a relief.

17. Thus, in my view, the present writ petition is not maintainable as no legal right of the petitioner is shown to have been infringed and as the Government is not shown to be under a duty to make a declaration as prayed for so that the omission to exercise that power can be made good in this proceeding.

18. For all the reasons stated above, this writ petition is rejected as not maintainable.

R.S. .... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G. Ramanujam and K. Shanmukham, JJ.*

*W.A.No. 9 of 1983. *12th September, 1984.*

V. Subramania Padayachi *Appellant**

v.

The State of Tamil Nadu, represented by its Secretary, Department of Revenue, Madras and others *Respondents.*

(A) Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961), section 76 as amended by Act (II of 1979) - Does not infringe Article 14 of the Constitution.

(B) Constitution of India (1950), Article 14.

Under section 76 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land)

Act, 1961, before its amendment by Act II of 1979, only a Subordinate Judge of the area was constituted as the Land Tribunal. By the said amending Act, the Land Tribunal should consist of a Judicial Officer not below the rank of a Subordinate Judge or an officer not below the rank of District Revenue Officer. The amendment was challenged. It was held that the amending Act did not bring about any change in the appellate forum. It was only in the personnel there was a difference. The litigant had got no vested right to have his appeal heard by a particular person or authority. There was no discrimination of difference brought about by the amendment. Having regard to the laudable object of reducing the work-load of Civil Courts, the District Revenue Officers had been constituted as Land Tribunals; such a change brought about to reduce the work-load of Civil Courts could not be characterised as discriminatory. As a matter of fact, in this case, there is no classification either based on the types of cases or the class of persons approaching the Tribunal.
[Paras. 2 & 3]

(C) Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961), section 76-A and G.O.Ms.No.1827, Revenue, dated 21st August, 1979 - Power exercised by Government under the G.O. is not a power of transfer.

The power conferred on and exercised by the State Government under G.O.No. 1827, Revenue, dated 21st August, 1979 is not a power of transfer but it is a substitution of Land Tribunal presided over by a Judicial Officer by Land Tribunal presided over by District Revenue Officer. It cannot be denied that the power to constitute a Tribunal under section 76 vests with the State Government and if the State Govenment has got the power to constitute a Tribunal, they have also power to reconstitute the Tribunal if circumstances warrant. In this case, originally, the Land Tribunal, with a Judicial Officer as (sic) Presiding Officer was constituted and in its place the Government has now chosen to reconstitute the Tribunal with a District Revenue Officer as Presiding Officer. Thus the Government has not exercised the power of transferring a proceeding from one Tribunal to another but has substituted one Tribunal with another Tribunal which it has got the power to do under sections 76 and 77 of the Act. *[Para. 4]*

R.Balasubramaniam and *S.Selvaraj*, for Appellant.

C. Chinnaswami, Addl. Government Pleader, for Respondent.

The Court made the following

ORDER:- The appellant herein claims to own about 15 standard acres of land in Vandipalayam village, Ulundurpet taluk. A show cause notice was issued to the appellant by the 3rd respondent herein (the Authorised Officer, Villupuram), to show cause as to why the excess land in his possession, should not be taken by the Government. The appellant filed his objection contending that he is not in possession of any excess land and that the lands in the name of his wife cannot be clubbed with the extent held by him for purpose of Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, hereinafter referred to as the Act. The 3rd respondent herein, viz., the Authorised Officer, held that the petitioner is holding 28.47 ordinary acres of land in excess of the permissible holding and, therefore such excess lands will stand transferred to the Government. As against the said order, the appellant filed an appeal before the Tribunal, constituted under section 76 of the Act. Under section 76 before its amendment by Act 2 of 1979 only a Subordinate Judge of the area was constituted as the Land Tribunal. However, by the said amending Act the Land Tribunal should consist of a Judicial Officer not below the rank of a Subordinate Judge or an officer not below the rank of District Revenue Officer. The appellant, who as already stated, filed an appeal under section 78 of the Act to the Land Tribunal has now chosen to question the said amendment which brought about a change in the constitution of Land Tribunal. The appellant's challenge as against the amendment brought in by Act 2 of 1979 was on the following three

grounds: (1) The appellant has acquired a vested right to have his appeal filed under section 78 to be heard by a Judicial Officer as was the position before the amending Act of 1979 and such a right cannot be taken away arbitrarily especially when a judicial officer who has got the requisite judicial temperament and judicial training to decide the appeals filed under section 78 has been constituted the Land Tribunal. (2) In any event, section 76 which contemplates the constitution of either a Judicial Officer not below the rank of a Subordinate Judge or an Officer not below the rank of a District Revenue Officer, as Land Tribunal is quite arbitrary as it does not contain any guidelines as to in what types of cases the Subordinate Judge will constitute a Tribunal and in what cases the District Revenue Officer will constitute a Tribunal and if section 76 were to be enforced without any guidelines, it will lead to unreasonable and indiscriminate exercise of power and (3) the order in G.O.Ms. No.1827, Revenue, dated 21st August, 1979, under which the Government has chosen to appoint Land Tribunals with District Revenue Officers as Presiding Officers in the place of the Tribunals with judicial officers in certain areas is bad for the reason that the Government has not been conferred with the power of transfer and the power of transfer is in fact vested only with the Land Commissioner under section 76-A of the Act.

2. All the above three conentions have been elaborately considered, if we may say so with respect, by Nainar Sundaram, J. and the learned Judge has chosen to reject all the contentions as not being tenable. Though before us the learned Counsel for the appellant had chosen to canvass the correctness of the judgment of the learned Judge, on a due consideration of the matter, we are of the view that the decision rendered by the learned Judge does not call for any interference in this appeal. So far as the first contention is concerned, as pointed out by the learned Judge persons like the appellant can if at all be said to have acquired a vested right to the appellate forum constituted under section 76, but they have no vested right to have their appeal filed under section 78 to be heard by a particular person or officer. It is no doubt true, before the amending Act of 1979 an Officer not below the rank of a Subordinate Judge was constituted as Land Tribunal. Later in addition to an officer not below the rank of a Subordinate Judge, an officer not below the rank of a District Revenue Officer has also been constituted as Land Tribunal and after the amendment of section 76 in 1979, the Government passed G.O.Ms. No.1827, Revenue, dated 21st August, 1979, substituting some of the existing land tribunals presided by Judicial Officers with Land Tribunals presided over by District Revenue Officers. Thus the amending Act does not bring about any change in the appellate forum. It is only in the personnel there is a difference. But as already stated, no litigant has got a vested right to have his appeal heard by a particular person or authority. We are, therefore in entire agreement with the learned Judge that the appellate is not right in saying that he has got a vested right to have his appeal heard by a Tribunal presided over by a Judicial Officer and that right has been now taken away.

3. Coming to the second ground of attack which is based on Article 14 of the Constitution of India, we find that the learned Judge has rejected the said contention on the ground that there is no discrimination or difference brought about by the amendment and that having regard to the laudable object of reducing the work load of civil Courts the District Revenue Officers have been constituted as Land Tribunals, such a change brought about to reduce the work load of civil Court cannot be characterised as discriminatory. As a matter of fact, in this case, there is no classification either based on the types of cases or the class of persons approaching the Tribunal. But the matter of constituting either the Subordinate Judge of the District Revenue Officer as the Land Tribunal will be considered by the State Government having regard to the object with which the amendment was brought in, that is, to reduce the work load of civil Courts. Therefore,

the second ground of attack also fails.

4. Coming to the third ground of attack which mainly relates to the order passed by the State Government in G.O.Ms.No. 1827, Revenue, dated 21st August, 1979 we find that the power conferred exercised by the State Government under the said G.O. is not a power of transfer as contended by the learned Counsel for the appellant, but it is substitution of Land Tribunal presided over by a Judicial Officer by Land Tribunal presided over by District Revenue Officer. It cannot be denied that the power to constitute a Tribunal under section 76 vests with the State Government and if the State Government has got the power to constitute a Tribunal they have also the power to reconstitute the Tribunal if circumstances warrant. In this case, originally, the Land Tribunal with a Judicial Officer as the Presiding Officer was constituted and in its place the Government has now chosen to reconstitute the Tribunal with a District Revenue Officer as Presiding Officer. Thus the government has not exercised the power of transferring a proceeding from one Tribunal to another but has substituted one Tribunal with another Tribunal which it has got the power to do under sections 76 and 77 of the Act. On this aspect of the matter also, we are inclined to agree with the learned Judge whose order has been challenged before us.

5. Since all the contentions advanced by the appellant fail, the writ appeal is dismissed. There will, however, be no order as to costs.

B.S. .... *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *P.R. Gokulakrishnan, J.*

*C.R.P.No. 4880 of 1982. *17th July, 1984.*

T.K. Doraiswamy *Petitioner**

v.

Premchand and others *Respondents.*

(A) Civil Procedure Code (V of 1908) - Section 47 - Effect of amendment by Act 104 of 1976 - Order passed not appealable - Only a revision lies to High Court.

(B) Civil Procedure Code (Amendment) Act (104 of 1976), Clause 97 (2) (a) - Applicability.

(C) Civil Procedure Code (V of 1908), Section 2 - Decree - Definition of.

The definition section of the Code of Civil Procedure which is section 2, as far as decree is concerned subsequent to the amendment by the Code of Civil Procedure (Amendment) Act, 1976 does not take in an order under section 47 as coming under the definition of a 'decree'. If that be so, the order passed under section 47 of the Code of Civil Procedure is not appealable and only a revision can be filed before the High Court. *[Para. 1]*

The order made in R.E.A.No. 126 of 1976 is dated 4.3.1977. Act 104 of 1976 came into force on 1.2.1977 itself. If that be so, any order passed under section 47, Civil Procedure Code, cannot give either to the petitioner or the respondent a right of appeal. *[Para. 1]*

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Salem dated 20-11-78 and made/passed in C.M.A. No.115/77. (R.E.A.No.126/76 in R.E.P.No. 56/72 in O.S.No.318/76, II Additional Sub Judge, Salem).

M.N.Padmanabhan, for Petitioner.

R. Vedantham, for Respondents.

The Court made the following

ORDER:- The petitioner herein has come forward with this civil revision petition against the dismissal of C.M.A.No.115 of 1977 holding that the petitioner herein cannot maintain the appeal in view of the amended provision in the Code of Civil Procedure. As per the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), clause 97 (2) (a) reads as follows:

> "The amendment made to clause (2) of the Principal Act by section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in section 47 and every such appeal shall be dealt with as if the said section 3 had not come into force."

The definition section of the Code of Civil Procedure which is section 2, as far as decree is concerned subsequent to the amendment, does not take in an order under section 47 as coming under the definition of a 'decree'. If that be so, the order passed under section 47 of the Code of Civil Procedure is not appealable and only a revision can be filed before the High Court. Correctly, the lower appellate Court has dismissed the appeal as not maintainable. The order made in R.E.A.No.126 of 1976 is dated 4.3.1977. Act 104 of 1976 came into force on 1.2.1977 itself. If that be so, any order passed under section 47, Civil Procedure Code, cannot give, either to the petitioner or to the respondent, of right of appeal. For all these reasons, I am of the view that the dismissal of the C.M.A. is correct in law. The civil revision petition is dismissed. No costs.

R.S. ...... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *V. Ratnam, J.*

*C.R.P.No.3357 of 1982. *17th June, 1985.*

K.Chinnakannammal *Petitioner**

v.

Biharilal S.Lulla *Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act XXIII of 1973, section 10 (3) (c) - Additional accommodation for residential purposes - Question of hardship to the tenant as outweighing the advantage to the landlord, when can be considered.

Held: As per the decision in *M/s. Thirupathi Nadar and Sons v. Dr. S.L.Kantha Rao*, I.L.R. (1981) 1 Mad. 128, the landlady can ask for additional accommodation only for residential purposes and she has in the instant case prayed only for such additional residential accommodation in her application for eviction under section 10 (3) (c) of Act 18 of 1960. The proviso relied upon by the respondent does not alter this position, for, at best, it only entitles the Rent Controller to decline to grant relief to the landlady in the event of its being established that the hardship caused to the tenant by the passing of an order for eviction would outweigh the advantage that may accrue to the landlady. *[Para. 7]*

The question of relative hardship relevant for consideration in accordance with the proviso to section 10 (3) (c) of the Act would properly arise only when the application for eviction under section 10 (3) (c) of the Act for additional accommodation is held to be maintainable. When such an application is dismissed as not maintainable the Appellate Authority has no jurisdiction to render a finding whether the hardship that may be caused to the tenant by granting the application would outweigh the advantage to the landlord. *[Para. 12]*

Cases referred to:-

M/s. Thirupathi Nadar and Sons v. Dr. S.L.Kantha Rao, I.L.R. (1981) 1 Mad. 128; *Associated Traders v. Abdul Hameed*, (1983) 2 M.L.J. 538 : 96 L.W. 566 : A.I.R. 1984 Mad. 21.

The Advocate General, for *D.Raju*, for Petitioner.

Habibullah Badsha, for Respondent.

The Court made the following

ORDER:- The landlady, who succeeded in securing an order for eviction before the Rent Controller on her application filed under section 10 (3) (c) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960, as amended by Act 23 of 1973 (hereinafter referred to as 'the Act') and lost before the Appellate Authority, is the petitioner in this Civil Revision Petition. The premises in the occupation of the respondent is a portion in the first floor in Door No.13, Bp Begum Street, Mount Road, Madras-2. The petitioner has two daughters and two sons. The first son of the petitioner, at the time of initiation of proceedings, was about 26 years and her second son was aged about 22 years. The first son of the petitioner was of marriageable age and the petitioner was seeking alliance for his marriage. The second son of the petitioner was pursuing his studies. The petitioner stated that in the event of the marriage of her first son, more accommodation would be required to comfortably house the couple and also to accommodate other relations who may come and stay. The second son, according to the petitioner, also required a separate study room. Besides, of the two daughters of the petitioner, both of whom were married, one was living in Madras and she used to come and stay with the petitioner quite often and the other daughter, her husband and the members of her family used to come and stay with the petitioner during vacation and festival days and other family functions, which required more accommodation. Under those circumstances, the petitioner stated that she *bona fide* required the premises in the occupation of the respondent as and by way of additional accommodation and filed H.R.C.No. 1160 of 1979 under section 10 (3) (c) of the Act praying for an order of eviction against the respondent.

2. In the counter filed by the respondent, he denied the requirement of the petitioner and stated that the portion already available with her was more than enough to accommodate all the members of the family comfortably even in future and that her requirement is not *bona fide*. A plea that the hardship that is likely to be caused to the respondent will outweigh the advantages to the petitioner by the granting of an order of eviction was also put forth. An objection that the petitioner is not under law entitled to evict the respondent, as he is occupying a non-residential portion was also raised. The respondent, therefore, prayed for the dismissal of the application for eviction.

3. Before the Rent Controller (VI Judge, Court of Small Causes), Madras, on behalf of the petitioner, Exhibits P-1 to P-7 were marked and her son was examined as P.W.1, while, on behalf of the respondent, Exhibit R-1 series was filed and the brother of the respondent was examined as R.W.1. A Commissioner was also appointed to make a local inspection and Exhibit C-1 is the report of the Commissioner with plans appended. On a consideration of the oral as well as the documentary evidence, the learned Rent Controller found that the requirement by the petitioner of the premises in the occupation of the respondent by way of additional accommodation is genuine and *bona fide* and that the hardship that is likely to be caused to the respondent would not outweigh the advantage to the landlord and allowed the application ordering the eviction of the respondent. Aggrieved by that, the respondent herein preferred H.R.A.No. 2267 of 1979 before the Appellate Authority (II Judge, Court of Small Causes), Madras. The Appellate Authority found that the application filed by the petitioner herein under section 10 (3) (c) of the Act is not maintainable and that the requirement of the petitioner is not *bona fide*. On those conclusions, the application for eviction filed by the petitio-

ner was dismissed. It is the correctness of this order that is challenged in this Civil Revision Petition.

4. In support of this Civil Revision Petition, the learned Advocate-General first contended that the Appellate Authority had erroneously interpreted the decision of the Division Bench of this Court reported in *M/s. M.Thirupathi Nadar and Sons v. Dr.S.L.Kantha Rao*, I.L.R. (1981) 1 Mad. 128, and stated that the purpose for which the tenant in occupation had used the premises is really not very material, but that the nature of the building, whether residential or not, would be the determining factor. It was also pointed out with reference to the plan that the first-floor comprised of three rooms only and the building is a residential one and the available accommodation was insufficient and, therefore, there was no legal impediment in the way of the petitioner securing an order for eviction against the respondent with reference to the premises under his occupation for residential purposes, irrespective of the nature of the user to which the premises is put by the respondent. On the other hand, the learned Counsel for the respondent would submit that on a proper interpretation of section 10 (3) (c) of the Act, additional accommodation can be secured by the landlord only for the same purpose for which the tenant is using the premises and not for others and, therefore, the petitioner is not in order in requiring the premises for residential purposes. Reliance was also placed upon the proviso as supporting this interpretation of section 10 (3) (c) of the Act.

5. Though earlier there have been some decisions of this Court having a bearing upon that question, all those decisions came to be considered in the context of the maintainability of an application for eviction with reference to sections 10 (3) (a) (iii) and 10 (3) (c) of the Act in *M/s. Thirupathi Nadar and Sons v. Dr. S.L.Kantha Rao*, I.L.R. (1981) 1 Mad. 128. In that case the landlord was residing in the first-floor of a building, while the tenant was in occupation of the ground-floor carrying on business. The application for eviction was filed both under sections 10 (3) (a) (iii) and 10 (3) (c) of the Act and the landlord required the ground-floor portion for the purpose of running a dispensary. The authorities below ordered eviction. In the Civil Revision Petition before this Court, the objection raised by the tenant was that section 10(3)(c) of the Act alone would be applicable, in which case considerations of relative hardship would also be relevant and since there was neither plea nor evidence in support thereof, the application for eviction should be dismissed. In the context of considering this objection, the scope and requirements of section 10 (3) (c) of the Act was elaborately considered. It was pointed out that in the earlier decisions attention had not been paid to the qualifying words, "residential and non-residential" occurring in the beginning of section 10(3)(c) of the Act and that even if the word 'building' occurring in section 10(3)(c) of the Act is to be understood differently from its definition contained in section 2 (2) of the Act, there is no test for ascertaining whether a building is a residential one or a non-residential one and that before section 10 (3) (c) of the Act is invoked, it is imperative to make it clear whether a building is a residential one or a non-residential one, as the purpose for which additional accommodation is required is in-extricably bound up with the nature of the building. Emphasising the aforesaid aspects, it was laid down that section 10 (3)(c) of the Act has to be read distributively, one dealing with residential building and the other with non-residential building. The Division Bench further proceeded to state that if so read, it will read as under with regard to residential building:-

> "A landlord who is occupying only a part of a residential building, may, notwithstanding anything contained in clause (a), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes."

and as follows in so far as non-residential buildings are concerned;

"A landlord who is occupying only a part of a non-residential building, may, notwithstanding anything contained in clause (a), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for purposes of a business which he is carrying on."

Further, the scope of section 10(3)(c) of the Act has been stated to be as follows:

"Whatever meaning we attribute to the word "building" occurring in section 10(3)(c), before section 10 (3) (c) can be invoked, the first thing that has to be ascertained is whether the building is a residential building or a non-residential building. If it is a residential building, the landlord can obtain additional accommodation only for the purpose of his residence. If it is a non-residential building, the landlord can obtain additional accommodation only for the purpose of the business which he is carrying on. This conclusion flows from the use of the two expressions occurring in the section. One is the expression "additional accommodation" and the other is the expression "as the case may be". The word "additional" is in common use and its meaning is very well understood by people generally as being something that is added to or put into a thing already in existence ....having regard to the dichotomy between the residential building and the non-residential building expressly provided for in the sub-section itself, eviction can be sought only for the purpose of residence if the building is a residential building and only for the purpose of carrying on a business if the building is a non-residential one."

Later, the Bench pointed out that for invoking section 10 (3) (c) of the Act, the following conditions must be satisfied:

"In the case of a residential building additional accommodation can be obtained only for residential purpose. In the case of a non-residential building additional accommodation can be obtained only for purposes of business which the landlord is carrying on."

Finally, it was pointed out that section 10 (3) (c) of the Act did not have any application in that case because the landlord did not require additional accommodation for purposes of residence, but wanted it for running his dispensary. It is significant that even according to the decision of the Division Bench, the user to which the premises is put by the tenant is not a determining or decisive factor in the consideration of a request for additional accommodation under section 10 (3) (c) of the Act, but it is the occupation of a part of a residential or non-residential building by the landlord that would be relevant.

6. It is in the light of the abovesaid principles that the correctness of the order of the Appellate Authority has to be tested. In the course of paragraph 6 of its order, the Appellate Authority has referred to the decision of the Division Bench of this Court in *M/s. M. Thirupathi Nadar and Sons v. Dr. S.L. Kantha Rao*, I.L.R. (1981) 1 Mad. 128, but it has not unfortunately made any attempt to understand and appreciate the reasoning of the decision and the final decision with reference to the facts which gave rise to that case. The Appellate Authority erroneously assumed that the position in law is well settled that a landlord in occupation of a residential portion of his building cannot require a non-residential portion from the tenant by way of additional accommodation under section 10(3)(c) of the Act. On this assumption, the Appellate Authority had further found that the application for eviction filed by the landlady under section 10(3)(c) of the Act is not maintainable. The basis upon which the Division Bench rendered its decision and the interpretation put upon section 10(3)(c) of the Act have already been set out. It is seen therefrom that whether the word 'building' is given the normal and ordinary

meaning or the meaning as defined in section 2 (2) of the Act, before section 10 (3) (c) of the Act can be invoked, the first thing to be ascertained is whether the building is a residential building or a non-residential building. If it is a residential building, the division Bench has laid down that the landlord can obtain additional accommodation only for the purpose of his residence. Similarly, if it is a non-residential building, the landlord can obtain additional accommodation for the purpose of the business which he is carrying on. This is also reiterated by the Division Bench by setting out the conditions to be fulfilled for invoking section 10 (3) (c) of the Act and in that context the Division Bench has laid down that in the case of a residential building, additional accommodation can be obtained only for residential purposes, while, in the case of a non-residential building, additional accommodation can be obtained only for purpose of a business which the landlord is carrying on. Finally, the Division Bench has stated, on the facts of that case, that as the landlord did not require additional accommodation of the ground-floor for purposes of residence, while he was living in the first-floor, but had required the ground-floor (which was put to a non-residential user) as and by way of additional accommodation for the purpose of running a dispensary and a clinic, the applicability of section 10 (3) (c) of the Act was ruled out. Unfortunately, the Appellate Authority has bestowed very scant attention to the facts giving rise to the decision of the Division Bench as well as the reasoning for the decision and had assumed that the user of the premises in the occupation of the tenant will have a material bearing upon the maintainability of the application under section 10 (3) (c) of the Act. In other words, the Appellate Authority has completely misunderstood, misinterpreted and misapplied the Bench decision. On a correct and proper understanding and appreciation of the decision of the Division Bench, the relevant consideration, on the facts of this case, would be whether the landlady is in occupation of a part of a residential building and not whether the tenant is in occupation of a portion for non-residential purposes. This has been totally lost sight of by the Appellate Authority and that has led it to arrive at an erroneous conclusion regarding the maintainability of the application for eviction filed by the landlady under section 10 (3) (c) of the Act.

7. In this case, there is the report of the Commissioner Exhibit C-1 as well as a plan showing the first-floor of the building concerned in this Civil Revision Petition. It is seen from paragraphs 10 to 14 of the report of the Commissioner and his plan that there are three rooms in the rear portion and that the petitioner is using one room as a kitchen, the other as a pooja room and the third as a bed-room. The plan further shows a grilled verandah and a portion which is open to the sky and a bath-room and f.o.l as well. The two rooms in the occupation of the respondent are located in the front portion of the first-floor abutting a balcony. No doubt, the Commissioner has observed in paragraph 20 of the report that the rooms are used for storing automobile goods. From the features disclosed by Exhibit C-1, it is at once apparent that the landlady is undoubtedly in occupation of a part of a building for residential purposes. The nature of the floor area under the residential accommodation of the landlady together with the existence of a verandah, balcony, bath-room, f.o.l etc., establish that the first-floor is a residential building. Therefore, as per the decision of the Division Bench referred to earlier, the landlady can ask for additional accommodation only for residential purposes and she has prayed only for such additional residential accommodation in her application for eviction under section 10 (3) (c) of the Act. The proviso relied upon by the learned Counsel for the respondent does not, in my view, alter this position, for, at best it only enables the Rent Controller to decline to grant relief to the landlady in the event of its being established that the hardship caused to the tenant by the passing of an order for eviction would outweigh the advantage that may accrue to the landlady. Under those circumstances, the Appellate Authority was in error in having concluded that the application for eviction filed by the land-lady under

section 10 (3)(c) of the Act is not maintainable.

8. The learned Advocate-General next contended that the finding recorded by the Appellate Authority to the effect that the application for eviction lacked in *bona fide* is erroneous and unsustainable. Attention in this connection was drawn to the reasoning given by the Appellate Authority and it was pointed out that as per the report of the Commissioner and the evidence of P.W.1, another tenant was in occupation of a residential portion in the ground-floor and the landlady was not in possession of that portion and, therefore, the conclusion of the Appellate Authority regarding *bona fides* proceeding on the basis of suppression of materials by the landlady is unsustainable. On the other hand, the learned Counsel for the respondent submitted that the landlady was in occupation of residential accommodation even in the ground floor and that had not been disclosed and that would suffice to reject the claim of the petitioner for additional accommodation as not being *bona fide*.

9. Again, on the question of *bona fides* of the requirement of the landlady, the Appellate Authority, to say the least, has blundered. The Appellate Authority found lack of *bona fides* on the ground that the landlady has suppressed her occupation of a residential portion in the ground-floor and that even assuming that the ground-floor residential portion was in the occupation of a tenant, she had not filed an application for eviction against that tenant, but instead had launched proceedings against the respondent in occupation of non-residential portion. This was also characterised by the Appellate Authority as extraordinary and unnatural conduct on the part of the landlady. Here again, the Appellate Authority had totally misdirected itself in considering the question of *bona fides* and had failed to advert to the vital and important pieces of evidence establishing contra. Even according to the Appellate Authority, the dispute regarding the occupation of a portion in the ground-floor by another tenant arose only during the enquiry and had not been reflected in the pleadings at all. If there was no basis at all laid for any particular plea, the Court is not bound to consider it and on this short ground alone, the Appellate Authority should have declined to embark upon an investigation of a dispute not pleaded. Even assuming that it was open to the Appellate Authority to consider in the course of the enquiry a dispute not reflected in the pleadings, it is seen that the Appellate Authority had completely omitted to take into account clinching and relevant evidence in this regard and had brushed aside the same for no reason whatever. Too much reliance has been placed by the Appellate Authority upon certain voters' list as establishing that a residential portion in the ground-floor was not in the occupation of a tenant of the name of Mallika. It is common knowledge that many persons are omitted to be enumerated in the voters' list for a variety of reasons despite their having a fixed abode and residence. Therefore, the absence of the name of Mallika in the voters' list cannot be taken to be conclusive factor to establish that she was not a tenant of a portion of the ground-floor in the building. Likewise, the Appellate Authority has brushed aside the rent receipts issued to the respondent and two other tenants including the tenant in the residential occupation of a portion of the ground-floor on the ground that the collection of rent has been made by different persons for the three different tenants and that the son of the landlady was not a competent witness to give evidence regarding the collection of rents from Mallika with reference to her occupation of a portion in the ground-floor for residential purposes. The rent receipt book marked as Exhibit P-7 series commences from 1.4.1977 and runs upto 1.8.1979. The counter-foils show that when the receipts of payment of rent are issued, the signature of the tenant paying the rent had been taken. Under Ex.P-7 series, three tenants, namely, the respondent herein, Mallika and Balasubramaniam had paid rents for the period aforesaid. It is true that with reference to the receipts issued to Mallika, the receipts bear not only the full signature of the petitioner, but also the letters " சி. க. " apparently referring to Chinna-

kannammal, the landlady. Merely from this, it cannot be inferred that the receipts relating to Mallika alone are not reliable, when the receipt book in its entirely contains the counter-foils with reference to all the three tenants including the respondent who had paid the rents and whose signatures had also been taken on the reverse of the counter-foils. It is significant that these receipts date from 1.4.1977 onwards, while the application for eviction had been filed only on 29.3.1979. It is difficult to believe that anticipating the initiation of eviction proceedings against the respondent herein in 1979, receipts for payment of rent by Mallika had been got up and issued to her by the petitioner even from 1.4.1977. It is further significant that not even a suggestion was put to P.W.1 to the effect that the receipts were got up. The Appellate Authority was, therefore, in error in having discarded the receipts Exhibit P-7 series and those receipts show that Mallika was in occupation of a portion in the ground-floor for residential purposes and had been paying rents to the petitioner at least from 1.4.1977 onwards. The non-examination of Mallika is immaterial, for, the receipts under Exhibit P-7 series and the report of the Commissioner establish her tenancy. P.W.1 being the son of the petitioner who had issued the receipts is competent to speak to the issue of those receipts by his mother. The respondent has not gone into the box to deny that there is no tenant of the name of Mallika in occupation of a residential portion in the ground-floor. Only the brother of the respondent has given evidence and there is no knowing as to how he came to know that there is no tenant of the name of Mallika staying in the ground-floor. In any event, that is contrary to the documentary evidence in the shape of receipts Ex.P-7 series and cannot be accepted. On the other hand, the evidence of P.W.1 in the course of his cross-examination at the instance of the respondent is to the effect that Mallika is a relation of theirs and that she resides with her two children in the ground-floor portion and she had been paying rents under Exhibit P-7 series. He has also denied the suggestion that the petitioner is in occupation of a room in the ground-floor. Apart from this, there is the report of the Commissioner Exhibit C-1, which, in paragraph 7 clearly states that in the back portion a tenant by the name of Mallika Ammal is in occupation and that the portion under her occupation consists of a room measuring 11' x 8' 2" and a kitchen measuring 6' 6" x 9' 9" and a bath-room as well. The Commissioner also noticed photographs of some deities in the portion occupied by Mallika Ammal, intended for worship. The Commissioner also noticed an oven with soot in the kitchen. Unfortunately, this part of the report of the Commissioner has been completely ignored by the Appellate Authority. Thus, the evidence available on record as well as an on the spot investigation by the Commissioner clearly establish that Mallika is in occupation of a portion in the ground-floor for residential purposes and has been paying rents to the landlady. The Appellate Authority had concluded that the tenancy of Mallika is a myth and, therefore, the petitioner is guilty of suppression and that would establish lack of *bona fides*. That conclusion, as pointed out above, is opposed to the evidence on record and cannot, therefore, be sustained at all. The evidence clearly makes out that Mallika is a tenant in occupation of a residential portion in the ground-floor and there is, therefore, no suppression whatever by the landlady of the availability of a residential portion in the ground-floor. Therefore, the conclusion of the Appellate Authority that the application for eviction filed by the landlady lacked *bona fides* is erroneous and unsustainable.

10. The *bona fides* of the requirement is made out by the evidence on record. P.W.1 has stated in the course of his chief-examination that his mother, his brother, his sister Vijaya, her husband and their two children and himself are living in the rear portion of the first-floor consisting of three rooms and that the available accommodation is inadequate and insufficient. He has also stated that after the death of his father in 1971, his sister and his brother-in-law continued to stay with them. There is no cross-examination at all by the respondent

with reference to this. Even in the cross examination of R.W.1, he had admitted that there are many persons in the family of the petitioner and that he does not know the extent of accommodation available. It is significant that R.W.1 was unwilling to deny the number of members in the family of the petitioner as spoken to by P.W.1 or the insufficiency and inadequacy of the available accommodation. The unchallenged evidence of P.W.1 shows that seven members of the family of the petitioner including two children are obliged to use three rooms, one of which is exclusively used as a kitchen and the other as a pooja room, with the result that only one room is under the effective occupation of the members of the family of the petitioner and that room is found from paragraph 14 of the report of the Commissioner to be used as bed-room by the son-in-law. Undoubtedly, therefore, there is nothing wrong in the petitioner desiring to have more comfortable and convenient accommodation for all the members of the family and in having come forward with an application for additional accommodation for residential purposes even with reference to the two rooms under the occupation of the respondent. The Appellate Authority was inclined to discountenance the claim of the petitioner that one of her daughters with her husband was residing with her on the ground that no ration card to substantiate the same has been produced. The non-production of a ration card is not very material. Earlier, the evidence given by P.W.1 with reference to the persons staying in the residential portion with the petitioner has been referred to and that has not been challenged at all by the respondent and in such a situation, it cannot be concluded that the daughter and son-in-law could only be casual visitors and for their accommodation, the respondent cannot be evicted. It is true that there is no evidence with reference to the visit of relations and sammandhis of the petitioner, but even assuming that they regularly visit the petitioner, that would not be a ground for additional accommodation. Nevertheless, having regard to the size of the family of the petitioner and the number of members comprised in it and taking into account the insufficient and inadequate accommodation now available, the petitioner has clearly made out her genuine need for additional accommodation and that need is established to be *bona fide* as the existing accommodation is insufficient for their comfortable living. The conclusion of the Appellate Authority that the requirement of the petitioner lacks *bona fides* and that the existing accommodation cannot be held to be insufficient is, therefore, erroneous and cannot be sustained at all.

11. Lastly, the learned Advocate-General contended that nothing at all had been stated by the respondent on the question of relative hardship and, therefore, the proviso cannot be put against the petitioner to refuse an order of eviction in her favour. Attention was also drawn in this connection to the decision in *Chimanlal Royachand Mehta v. Doraiswami Ayyar*, (1955) 1 M.L.J. (S.N.) 68, to the effect that it was for the respondent to prove that the hardship will be so great that an order of eviction ought not to be granted. On the other hand, the learned Counsel for the respondent maintained that the respondent would suffer great hardship in the event of his being evicted.

12. The question of relative hardship relevant for consideration in accordance with the proviso to section 10 (3) (c) of the Act would properly arise only when the application for eviction under section 10(3)(c) of the Act for additional accommodation is held to be maintainable. When such an application is dismissed as not maintainable, the Appellate Authority has no jurisdiction to render a finding whether the hardship that might be caused to the tenant by granting the application would outweigh the advantage to the landlord (*vide Associated Traders v. Abdul Hameed*, 96 L.W. 566 : (1983) 2 M.L.J. 538 : A.I.R. 1984 Mad. 21. Despite this, towards the concluding portion of paragraph 9 of its order, the Appellate Authority, while holding that casual visits by relatives cannot be accepted as a sufficient ground for evicting the tenant, proceeded to state that in such a case the hardship to the tenant will

outweigh the advantage accruing to the landlady. No doubt, in paragraph 7 of the counter, the respondent has generally stated that the hardship caused to him will outweigh the advantage to the petitioner, as he had established his business and the area is also predominantly one meant for the conduct of the automobile business. The evidence of R.W.1 does not establish that any serious or great hardship would be caused to the respondent by an order for eviction being passed against him. It is not the case of the respondent that accommodation similar to the one now available to him is utterly impossible to be secured. The evidence of R.W.1 also does not make out that accommodation similar to the one now with the respondent is not available anywhere in the area in question. All that the respondent has to do is to be on the look-out for other similar accommodation, which has not been stated to be unavailable in the locality. It may be that the respondent may be obliged to pay slightly higher rent. But that cannot be considered to be such a great hardship of a kind on the respondent outweighing the advantage accruing to the petitioner by the passing of the order for eviction justifying the refusal of relief to the petitioner on the ground of relative hardship.

13. Thus, on a careful consideration of all the facts and circumstances of the case, it has to be held that the Appellate Authority was in error in holding that the application for eviction filed by the petitioner under section 10(3)(c) of the Act for additional accommodation for residential purposes was not maintainable and that the requirement of the petitioner was not *bona fide* and further that the relief should be declined to be given to the petitioner on the ground that the hardship to the respondent will outweigh the advantages accruing to the petitioner by granting an order of eviction in her favour. Consequently, the order of the Appellate Authority is set aside and that of the Rent Controller is restored. The Civil Revision Petition is allowed with costs throughout.

17.6.1985 RATNAM, J.

The learned Counsel for the respondent prays that the respondent may be granted some time to vacate and hand over vacant possession of the premises in his occupation to the petitioner and the learned Counsel for the petitioner has no objection to grant three months time to the respondent for doing so. Accordingly, the respondent is granted three months time from this day to vacate and hand over vacant possession of the premises in his occupation to the petitioner, but this will be subject to the condition that the respondent should file an unconditional affidavit of undertaking to that effect before this Court within ten days from this day, failing which the order of eviction can be put into execution forthwith.

R.S. .... *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.M. Natarajan, J.*

*Civil Revision Petition No. 4058 of 1982.
10th July, 1985.

K.Mohideen Sahib *Petitioner**

v.

Theodre Samuel *Respondent*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (XXIII of 1973), section 10 (2) (1) - Wilful default - Failure to resort to the procedures laid down in section 8 (1) to (5) would not constitute wilful default.

Held: In the instant case in view of the fact that the petitioner had sent the rent by money order and that the same was refused by the landlord repeatedly and in view of the fact that he has issued a notice calling upon the respondent to specify the name of the bank into which the rent has to be deposited and immediately after receipt of the notice, he deposited the entire arrears,

it cannot be said that the petitioner has committed wilful default in payment of rent. Both the Courts below have not properly appreciated the principles enunciated by the Supreme Court in *Sundaram Pillai v. Pattabiraman*, (1985) 98 L.W. 49 : (1985) 1 S.C.C. 591 : A.I.R. 1985 S.C. 582, to the facts of the instant case and the same has resulted in the order of eviction. The order of eviction passed by the authorities below is not sustainable and is liable to be set aside. *[Para. 5]*

Cases referred to:-

A.Soundarapandian Nadar v. A.S.Madaswamy Mudaliar, (1982) 95 L.W. 107; *S.Sundaram Pillai v. V.R. Pattabiraman*, (1985) 98 L.W. 49 : (1985) 1 S.C.C. 591 : A.I.R. 1985 S.C. 582.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (XXIII of 1973) praying the High Court to revise the order of the Court of the Small Causes (VI Judge), Madras dated 30.7.1982 made in R.C.A.No.454/82 (H.R.C. No.3687/81 of Court of Small Causes XI Judge, Madras).

The Court delivered the following

JUDGMENT:- The unsuccessful tenant is the petitioner. The respondent herein filed a petition for eviction under section 10 (2) (i) of the Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), for eviction of the petitioner herein, on the ground of wilful default. The case of the respondent is that he let out the petition-mentioned premises to the petitioner on a monthly rent of Rs.75/- and that the petitioner has not paid rent from January, 1981 onwards and thus has committed wilful default in payment of rent for the period from January 1981 to June, 1981. It is further alleged that the petitioner in order to cover up his default caused a notice dated 20.6.1981 to be issued to the respondent, on false and untenable grounds calling upon the respondent to specify a Bank in which the rents have to be deposited. In reply, the respondent directed the petitioner to deposit the rents in the Current Account in the Grindlays Bank, N.S.C. Bose Road. But the petitioner has not chosen to deposit the rent in the Bank. The petitioner herein contended that he has been regularly paying rent, that it was the respondent who refused to receive rent, that the respondent refused to receive the rent sent by money order and that thereafter the petitioner sent a notice to the respondent calling upon him to specify bank. The petitioner has not received the reply notice dated 4.7.1981 alleged to have been sent by the respondent. He has further alleged that the respondent had previously filed an application for eviction on the ground of sub-letting and he was unsuccessful both before the Rent Controller as well as the Appellate Authority and the appeal was disposed of in H.R.A.No.1275 of 1979. The respondent has also filed a revision-petition against that order contending that the rent is not at Rs.75/- and he claimed rent at Rs.150/- from the petitioner and the same is pending; as such, he is not entitled to file a petition for eviction on the ground of wilful default. According to the petitioner, he has deposited the entire arrears of Rs.525/- on the first date of hearing. On the side of the respondent landlord, he was examined as P.W.1 and Exhibits P-1 to P-5 were marked. On the side of the petitioner-tenant, he himself was examined as R.W.1 and Exhibit R-1 series were marked. The learned Rent Controller held that the respondent herein has established the wilful default in payment of rent and consequently he ordered eviction. On appeal, the learned Appellate Authority confirmed the said order. Hence the aggrieved tenant has preferred this revision.

2. Learned Counsel for the petitioner mainly contended that since the respondent refused to receive the rent sent by money order, the petitioner sent a notice to the respondent calling upon him to specify the name of the bank in which he could deposit the rent, that the alleged reply notice was not received, that he deposited the arrears on the first date of hearing, that his failure to resort to the proceedings under section 8 of the Act would not constitute a ground of wilful default

and that in any view in the circumstances of the case the default cannot be construed as wilful in view of the principles laid down by the Supreme Court in the latest pronouncement. According to the learned Counsel for the petitioner, the petitioner is aged about 80 years and that both the authorities had not properly interpreted the meaning of wilful default with reference to the facts of the case.

3. The only question to be considered in this revision is whether on the facts of the case the petitioner has committed wilful default in payment of rent and whether the order passed by the learned Appellate Authority is liable to be set aside.

4. It is the admitted case of both the parties that the respondent herein has filed a petition for eviction on the ground of sub-letting and the same was dismissed. He preferred an appeal H.R.A.No.1275 of 1979 and the same was dismissed. In the above proceedings, the respondent contended that the rate of rent was Rs.150/-. But, it was held that the rate of rent was only Rs.75/- per month. The respondent has filed a revision against the order passed by the Appellate Authority and the same is pending. It is established that the petitioner has sent rent by money order from January 1981 onwards and that the respondent has refused to receive the same. It is only the petitioner who has issued a notice under Exhibit P-1 on 20.6.1981 calling upon the respondent to specify the name of the bank for depositing the rent in the account of the respondent. But even though the respondent contended that he sent a reply under Exhibit P-2 to the petitioner, it was held by the Rent Controller and the Appellate Authority that it was not established that the said notice was served on the petitioner. The petitioner has produced Exhibit R-1 series to show that he had sent rent by money order for the disputed period. Even in Exhibit P-1 notice he has mentioned about the fact of sending the rent for January, February and March 1981 by money order and the respondent refusing to receive the same.

5. The learned Rent Controller as well as the learned Appellate Authority have arrived at a finding of wilful default on the ground that even though the petitioner has not been served with the reply notice Ex.P-2, he ought to have resorted to the procedure contemplated under section 8 (5) of the Tamil Nadu Buildings (Lease and Rent Control) Act and remitted the rent in Court and further there is no concrete evidence to show that the petitioner sent rent by money order for April, May and June 1981 and as such it is a case of wilful default on the part of the petitioner. It is seen from the judgments of the Courts below that the last leaf of Exhibit P-1 series shows that a sum of Rs.150/- was sent and the date is not legible and as such both the Courts have come to the conclusion that the petitioner has not established conclusively that he had sent rent for the later period of April, May and June 1981 also by money order. In the instant case, admittedly the petitioner has paid the entire arrears for the petition-mentioned default period even on the first hearing date. Learned Counsel for the petitioner drew my attention to the decision reported in *Soundarapandian Nadar v. A.S.Madaswamy Mudaliar*, (1982) 95 L.W. 107, wherein Singaravelu, J., held that the procedure prescribed under section 8 (2) of the Act is only optional and not mandatory and the non-adoption of the procedure does not constitute wilful default. In the above quoted case, the rent sent by money order was repeatedly refused by the landlord and thereupon the tenant deposited the rent in bank account opened in his name. Yet another decision brought to my notice is *Abdul Majeeth v. Masiammal*, 1981 T.L.N.J. 315, wherein Sengottuvelan, J., held that there is absolutely nothing in the provisions as to where the amount has to be deposited and no procedure has been contemplated and as such the failure to adopt the procedure under section 8 (5) would not constitute wilful default. On the other hand, the learned Counsel for the respondent drew my attention to the decision reported in *Marudachala Udayar v. Dhandapani*, (1980) 1 M.L.J. 169, and submitted that the failure to resort to section 8 (1) to (5) would constitute wilful default. The facts involved in the said case are

quite different and in the above quoted case it was held by Nainar Sundaram, J., that in the absence of proof of payment of rents, it will not be in consonance with the provisions of the Act to presume that the tenant must have paid the rents and the landlord must have declined to issue the receipts. In the circumstances, it was held that the tenant cannot be heard to say that the landlord never issued receipts for the payment of rents and the Court cannot ignore the implications of section 8 and assess the controversy without reference to such implication. I am in entire agreement with the view expressed by Singaravelu, J., and Sengottuvelan, J., in the above quoted cases regarding the failure to resort to the procedure contemplated under section 8 (5). Learned Counsel for the petitioner brought to my notice to latest decision rendered by the Supreme Court in *Sundaram Pillai S. v. V.R. Pattabiraman*, (1985) 98 L.W. 49 : (1985) 1 S.C.C. 591 : A.I.R. 1985 S.C. 582, on the question of wilful default. Their Lordships of the Supreme Court held:

> "Thus, consensus of the meaning of the words 'wilful default' appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, will full knowledge of legal consequences flowing therefrom. Taking for instance a case where a tenant commits default after default despite oral demands or reminders and fails to pay the rent without any just or lawful cause, it cannot be said that he is not guilty of wilful default because such a course of conduct manifestly amounts to wilful default as contemplated either by the Act or by other Acts referred to above."

In the light of the principles laid down in the above quoted decisions, it cannot be said that the petitioner has committed wilful default in payment of rent. I find much force in the contention of the learned Counsel for the petitioner. In view of the fact that the petitioner had sent the rent by money order and that the same was refused by the landlord repeatedly and in view of the fact that he has issued a notice calling upon the respondent to specify the name of the bank into which the rent has to be deposited and immediately after receipt of the notice, he deposited the entire arrears, it cannot be said that the petitioner has committed wilful default in payment of rent. Both the Courts below have not properly appreciated the principles enunciated by Their Lordships in the latest Supreme Court case to the facts of the instant case and the same has resulted in the order of eviction. For the reasons already set out I am of the view that the order of eviction passed by the authorities below is not sustainable and is liable to be set aside.

6. In the result, the revision is allowed, the order of both the authorities below is set aside and the eviction petition is dismissed. No order as to costs.

R.S. .... *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.A. Kader, J.*

*C.R.P.No. 3183 of1985.

12th September, 1985.

A. John *Petitioner**

v.

Bhumgara *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (XXIII of 1973), section 11 (3) and (4) - Scope and applicability.

On the question whether before passing an order of eviction under section 11 (4) of Act 18 of 1960 the Rent Controller must have held an enquiry under section 11 (3) and fixed the arrears of rent.

Held: It is not in all cases that an order under section 11 (4) of Act 18 of 1960

must be preceded by an order under section 11 (3) of Act. If the tenant denies that he is in arrears of any rent it will be necessary for the Rent Controller to go into the question and pass an order under section 11 (3) of the Act as to whether the tenant is in arrears of rent and fix the amount. When the tenant admits that he is in arrears of rent, though not to the extent claimed by the landlord, he is bound to deposit into Court or pay the admitted arrears, if he wants to contest the claim as laid down under section 11 (1) of the Act. Any default on the part of the tenant to pay or deposit the admitted arrears automatically attracts the provisions of section 11 (4) of the Act and disentitle him to contest the action and the Court is bound to pass an order directing him to vacate the premises and put the landlord in possession. *[Para. 6]*

T.R. Rajagopalan, for Petitioner.

The Court made the following

ORDER:- The revision petition arises out of the order of the District Judge, Nilgiris at Uthagamandalam and the Appellate Authority under the Tamil Nadu Buildings (Lease and Rent Control) Act in C.A.No. 165 of 1984, confirming the order of the Rent Controller (District Munsif) of Coonoor in R.C.O.P.No.445 of 1984. The aggrieved tenant is the revision petitioner.

2. The respondent herein is the landlady of the scheduled premises tenanted to the revision petitioner on a monthly rental of Rs.120/- as per the Gregorian calendar. According to the respondent-landlady the revision petitioner-tenant defaulted in the payment of rent from 1.4.1980 till 31.8.1981 and the arrears amounted to Rs.2,040/- at the time of the filing of the application for eviction. The default is wilful and hence the petition.

3. The revision petitioner-tenant contended that he had paid the rent upto the end of July 1980. According to him, the landlady was not in the habit of issuing receipts and the rent was being paid only in a lump sum. Hence, there was no wilful default.

4. During the pendency of the application before the Rent Controller, the learned Rent Controller on 1.9.1984 passed an order directing the tenant to pay the admitted arrears of rent on or before 28.9.1984. The revision petitioner-tenant did not pay as directed and hence on 29.9.1984 the Rent Controller passed an order of eviction, presumably under section 11 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Aggrieved thereby the tenant preferred an appeal before the Appellate Authority in R.C.A. No.165 of 1984. The Appellate Authority confirmed the order of eviction. Hence, this revision petition.

5. There is no dispute about the quantum of rent payable per month. The dispute is only regarding the period of arrears. According to the landlady the revision petitioner-tenant was in arrear of rent from 1.4.1980, while the tenant contended that he has in arrear only from August 1980. The Rent Controller has, therefore, directed the tenant to pay the admitted arrears of rent *i.e.*, arrears due from August, 1980. The tenant did not comply with this order and hence the Rent Controller has passed an order of eviction.

6. It is contended for the revision petitioner that the Rent Controller has not made an enquiry under section 11 (3) of the Act and determined the arrears of rent payable by the tenant and hence he had no power to pass order under section 11 (4) of the Act. This contention is totally untenable. It is not in all cases that an order under section 11 (4) must be preceded by an order under section 11 (3) of the Act. If the tenant denies that he is in arrears of any rent, it will be necessary for the Rent Controller to go into the question and pass an order under section 11 (3) of the Act as to whether the tenant is in arrears of rent and fix the amount. When the tenant admits that he is in arrears of rent, though not to the extent claimed by the landlord, he is bound to deposit into Court or pay the admitted arrears, if he wants to contest the claim as laid

down under section 11 (1) of the Act. Any default on the part of the tenant to pay or deposit the admitted arrears automatically attracts the provisions of section 11 (4) of the Act and disentitles him to contest the action and the Court is bound to pass an order directing him to vacate the premises and put the landlord in possession.

7. In the instant case admittedly the tenant was in arrears of rent from August, 1980. The Rent Controller granted the tenant time to pay the admitted arrears of rent. But the tenant has spurned the offer. Consequently the Rent Controller has passed an order under section 11(4) of the Act and directed eviction. The District Judge and Appellate Authority has rightly confirmed the order of the Rent Controller. I find no error of jurisdiction, incorrectness, illegality or impropriety in the orders of the lower authorities.

8. In the result, the revision petition fails and is dismissed.

9. The learned Counsel for the petitioner prays for three months' time to vacate the premises. Three months' time is granted on condition that the revision petitioner files into the Court of the Rent Controller an affidavit within a week from this date undertaking to vacate the premises on the expiry of the three months' time, failing which the landlady is entitled to execute the order of eviction forthwith.

R.S. .... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *K. Venkataswamy, J.*

*W.P.Nos. 1598 & 6703 of 1984/W.P.No. 1561 of 1984. *14th May, 1985.*

S. Varadarajan .*Petitioner**

v.

The Special Officer, T.U.C.S. Ltd., Madras-5 and others *Respondents.*

(A) Tamil Nadu Co-operative Societies Act (53 of 1961), section 72 - Special Officer appointed under Is a public authority - His order of dismissal against an employee - Writ petition challenging the validity of that order is maintainable.

(B) Constitution of India (1950), Article 226.

A writ petition challenging the validity of an order passed by a Special Officer appointed under section 72 of the Tamil Nadu Co-operative Societies Act, dismissing an employee is maintainable.

P. Kannan v. Office of the Director of Sugars, Madras, 1984 Writ L.R. 152, distinguished.

Cases referred to:-

P.Kannan v. Office of the Director of Sugars, Madras, 1984 Writ L.R. 152; *Madan Mohan Sengupta v. State of West Bengal,* (1966) 12 P.L.R. 30 : A.I.R. 1966 Cal. 23; *Ajay Hasia v.Khalid Mujib,* (1981) 1 S.C.C. 722 : (1981) 2 S.C.R. 79 : A.I.R. 1981 S.C. 487.

D. Murugesan, for Petitioner.

G. Viswanathan, for Respondent No.1.

The Court made the following

ORDER:- These two writ petitions are filed by the same individual questioning initially a show cause notice issued by the first respondent in W.P.No.1598 of 1984 and subsequently questioning

the order of dismissal by the respondent in W.P.No. 6703 of 1984.

2. As the matter relates to the same individual and the facts are also common, these two writ petitions are dealt with by this common order.

3. The brief facts leading to the filing of these writ petitions are the following: The petitioner, at the time of the issue of show cause notice was working as Supervisor in the Triplicane Urban Co-operative Society Limited, Madras-5, hereinafter called the 'TUCS'. A show cause notice on 15th June, 1983 was issued calling upon the petitioner to explain the charges set out in the show cause notice within seven days from the date of its receipt. The charges levelled against the petitioner along with three others were:

1. that they issued rationed commodities in excess against the limit fixed in the bills;

2. The A register number and the card number were not noted in the bills;

3. non-maintenance of registers while they were working in the Luz Mini Supermarket.

To this show cause notice the petitioner replied on 6th July, 1983 that he being a Sales Supervisor, has nothing to do with the charges and it is the Accountant who is answerable for the charges. An enquiry was conducted and the Enquiry Officer, namely, Co-operative Sub-Registrar, submitted his report. The Enquiry Officer found that all the charge-sheeted employees are responsible for the charges levelled against them and he also held all the charges proved. Based on the report of the Enquiry Officer, the first respondent in W.P.No.1598 of 1984 issued a second show cause notice on 11th February, 1984 calling upon the petitioner to show cause why he should not be dismissed from service. On receipt of the second show cause notice, the petitioner, aggrieved by that, filed W.P.No.1598 of 1984 and obtained an order of interim stay of all further proceedings. Final orders in W.M.P.Nos. 2461 and 9562 of 1984 were passed on 20th June, 1984 vacating the interim stay, initially granted and while vacating the interim stay, S.Natarajan, J., observed that the petitioner has got to meet the show cause notice and if his representation is not accepted and if he is aggrieved with the orders passed against him, the petitioner can then seek the interference of this Court to examine the merits of the case. A copy of this order seems to have been given subsequent to 23rd June, 1984. But on 21st June, 1984, the first respondent passed final orders dismissing the petitioner from service which made the petitioner file W.P.No. 6703 of 1984 challenging the order of dismissal.

4. Mr. G.Viswanathan, learned Counsel appearing for the first respondent raised a preliminary objection as to the maintainability of the writ petition against the first respondent whose orders are under challenge. He places reliance on a recent judgment of this Court reported in *P.Kannan v. Office of the Director of Sugars, Madras*, 1984 Writ L.R. 152, wherein Ratnavel Pandian, J., has held that a writ against a co-operative society cannot be granted. As against this, Mr. Murugesan, learned Counsel appearing for the petitioner, contended that the TUCS stands on a different footing as it is controlled by Government and 85 per cent of the shares are held by Government and he also pointed out various by-laws of the TUCS to support his stand. He also relied on a judgment of the Calcutta High Court in *Madan Mohan Sengupta v. State of West Bengal*, (1966) 12 F.L.R. 30 : A.I.R. 1966 Cal. 23, and a Division Bench judgment of this Court against the very same TUCS. He placed reliance on a judgment of the Supreme Court in *Ajay Hosia v. Khalid Mujib*, (1981) 1 S.C.C. 722 : (1981) 2 S.C.R. 79 : A.I.R. 1981 S.C. 487. The Division Bench judgment of this Court, in Writ Appeal No. 74 of 1970, dated 13th November, 1973, seems to be directly in point and that being a case relating to the very same TUCS it is binding on me. The Division Bench judgment reads as follows:

"Though the learned Judge found that

the disposal of the appeal by the self-same officer who had passed the order of dismissal was contrary to the principles of natural justice, he took the view that the Special Officer of the Triplicane Urban Co-operative Society Ltd., appointed under section 72 of the Tamil Nadu Co-operative Societies Act, 1961, was not a public authority whose order should be quashed. We are unable to concur in this view. The Special Officer is one appointed under section 72 and as such, he is a statutory officer and, therefore, he should be regarded as a public authority. Apart from that, Article 226 of the Constitution is not confined to issue of writs only to a public authority. The power extends also to issue directions to any person. That being so, the appeal is allowed. The result is, the Board of Directors will dispose of the appellant's appeal petition afresh and in accordance with law. No costs. The appeal will be disposed of by the Board of Directors within two months from the receipt of a certified copy of the order."

In view of the Division Bench judgment relating to the very same co-operative society reliance cannot be placed on the judgment of the learned single Judge in *P.Kannan v. Office of the Director of Sugars, Madras*, 1984 Writ L.R. 152. I, therefore, proceed to consider the cases on merits.

5. In the second show cause notice against which W.P.No.1598 of 1984 has been filed, it is stated as follows:

> "As a Sales Supervisor, Thiru S.Varadarajan has to exercise proper control over the staff for running the branch without any complaint. Had he exercised due control over the staff, this sort of complaints would have been avoided. It is clear that he was not vigilant in his duties and totally indifferent in the day-to-day affairs of the branch. ...
>
> He has failed in his duties to have an effective supervision and thus helped to commit serious offences in the distribution of controlled commodities which have been found out by Civil Supplies Department, which tarnished the fair name of the society. These acts were done with his knowledge. Violation of regulation governing the issue of controlled commodities is a serious offence under items Nos. 4, 26 and 29 of the omissions and commissions as per the Special Bye-laws relating to the service conditions of the employees framed by the Society for which the employees can be suspended and/or dismissed."

The contention is that the charge was one thing and the findings are different. On the basis of the findings, the petitioner cannot be held responsible for the charge. The petitioner was not given an opportunity; he was not called to show cause against his alleged failure to have an effective supervision which allegedly helped to commit serious offences in the distribution of controlled commodities, etc. As could be seen from the second show cause notice itself, the petitioner was not held directly responsible for the various charges levelled against the petitioner and three others. On the other hand, findings were given against the petitioner on the basis of some other material for which the petitioner was not given any opportunity. In similar circumstances, Ramanujam, J., in W.P. Nos.1418, 1815 and 1816 of 1984 (order dated 23rd January, 1985), has quashed the show cause notice itself and that decision is pressed into service by the learned Counsel for the petitioner. In that case, the learned Judge observed as follows:

> "Thus the Enquiry Officer himself has found that the six charges actually levelled against the above two petitioners have not been proved but they are found guilty of abetment and collusion with Govindaswami. But it is significant to note that there is no charge relating to abetment and collusion. Therefore, once the six charges levelled against them have been held not proved on the basis of the evidence, they cannot be proceeded against unless a fresh or separate charge of collusion and abetment is levelled against them and they are given opportunity to disprove

the said charge. None of the six charges levelled against them contains an allegation of collusion and abetment. Then, if they are to be held guilty of abetment and collusion, there should be a specific charge in that respect and without such a specific charge and an enquiry on such a charge, they cannot be held guilty of a charge of collusion and abetment."

6. Applying the above principles to the facts of this case, it can be safely held that there is no charge against the petitioner of ineffective supervision which helped to commit serious offences in the distribution of controlled commodities. Therefore, the second show cause notice is not sustainable.

7. Mr. G. Viswanathan, learned Counsel appearing for the first respondent, submitted that the issue of the second show-cause notice itself was unnecessary and therefore, even without that the first respondent can proceed with the matter. But the first respondent having issued the second show cause notice and when it is found that there is no finding against the petitioner which has direct relevance with the charges already framed, it is not open to the first respondent now to contend that the petitioner can be proceeded with further.

8. As noticed earlier, the interim stay granted pending disposal of W.P.No.1598 of 1984 was vacated on 20th June, 1984. Even before the order could be received, the respondent in W.P. No.6703 of 1984 passed final orders dismissing the petitioner from service. The petitioner challenges the order of dismissal on the grounds that it was passed in utter violation of the principles of natural justice, that the respondent was biased against the petitioner and that, in any event, the findings have no relevance to the charges framed against the petitioner and therefore, the order of dismissal cannot be sustained. In the light of the earlier discussions to hold that the second show cause notice itself is liable to be quashed, the order of dismissal passed on the basis of the second show cause notice also will have to go.

9. For all these reasons, the writ petitions are allowed. No costs.

R.S. .... *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Present:- *V. Ratnam, J.*

*Writ Petition No. 9777 of 1984.
11th February, 1985.

Delhi Properties and Building Society (Pvt.) Ltd., Madras, represented by its Director, Prabhat Kamal *Petitioner**

v.

The Assistant Commissioner of Urban Land Tax (Egmore), Madras-29 and another *Respondents.*

(A) Tamil Nadu Urban Land Tax Act (12 of 1966), section 19 - Transfer of urban land by the petitioner - Application for exemption under Tamil Nadu Urban Land Ceiling Act, 1978 - Pendency of application with the authorities - Details of transfer furnished by the transferor and transferee requesting re-assessment - Particulars filed by the petitioner returned - Petitioner directed to renew request after the disposal of the exemption application - Petitioner however assessed as on the same holding as at the beginning - Transfers effected by the petitioner not taken into consideration - Assessment to Urban Land Tax quashed.

(B) Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 - Exemption provisions.

(C) Constitution of India (1950), Article 226.

The pendency of an application for claiming an exemption is not really very relevant and cannot be used to throw out a reasona-

ble request made by the petitioner for re-assessment of the urban land tax after giving effect to the transfers effected by it in the course of subsequent years. The attitude of the authorities in continuing to assess the petitioner for urban land tax on the same holding as at the beginning without recognising transfers effected by the petitioner is not only un-reasonable but is totally un-supportable under the provisions of the Act; the petitioner has been made to pay almost a penalty for having conformed to the requirements of the provisions of the Act and the rules thereunder. Under these circumstances, the assessments made on the petitioner for faslis 1388 to 1394 cannot be sustained and have to be quashed. *[Para. 4]*

In this case the authorities below have proceeded to adopt a method and manner of assessment which is alien to the provisions of the Act and have actually assessed the petitioner for several years in relation to urban land not used by it. The respondent cannot fail to perform their statutory duty and at the same time say that the petitioner cannot approach this Court for remedying the wrong done. It has further to be borne in mind that the assessments made with reference to property not belonging to the petitioner are wholly illegal and without jurisdiction and not in conformity at all with the provisions of the Act and the petitioner cannot be told that even under those circumstance the High Court will not exercise its discretion in its favour. *[Para. 5]*

The *rule nisi* was made absolute and the writ petition was allowed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent relating to assessment of Urban Land Tax bearing R.S.No.1632/6 part and 1632/13 part in Egmore village in Assessment No.4/BK 52 Egmore, dated 15.12.77 and quash the same in so far as it relates to the assessment years fasli 1388 onwards.

K. Radhakrishnan, for Petitioner.

R. Lokapriya, Govt. Advocate (Taxes), for Respondents.

The Court made the following

ORDER:- In this writ petition, the petitioner, which is a private limited company, has prayed for the issue of a writ of *certiorari* or other appropriate writ calling for the records of the first respondent relating to the assessment to urban land tax with reference to R.S.No.1632/6 part and R.S.No. 1632/13 part in Egmore village in Assessment No. 4/BK 52 Egmore, dated 15.12.1977 and quash the same in so far as it relates to faslis 1388 to 1394. Originally the petitioner owned for purposes of development and sale an extent of 30 grounds comprised in Survey No.1632/4 re-numbered as Survey Nos.1632/13 and 1632/6 in Egmore having purchased the same under sale deed dated 28.4.1972. While developing portions of the extent so owned by the petitioner, the petitioner did so in stages utilising separate portions of the land owned by it. The first stage was the formation and the sale of flats in a portion of about 5 grounds and 1800 sq.ft. known as "Chesney Nilgiris". The second and the third stages were designated as "Chesney West" and "Chesney Estate" respectively. In so far as Chesney Nilgiris is concerned, the petitioner sold the flats standing over an extent of 5 grounds and 1800 sq.ft. to about 33 persons during 1973-74 and particulars of the purchasers were also furnished to the first respondent herein. In the Chesney West Project, the petitioner had dealt with and disposed of an area admeasuring 6 grounds and 1600 sq.ft. By an order No.31/BK 54 dated 15.12.1977, the first respondent determined an extent of 5 grounds and 1800 sq.ft. as land available in Chesney Nilgiris and made an assessment in the name of the petitioner and 19 other persons who had purchased undivided interest in the total extent during 1974-75. The remaining extent of 23 grounds and 465 sq.ft. was fixed to be the holding of the petitioner and by order No. NC 4/BK 52 dated 15.12.1977 the first respondent determined that a sum of Rs.10,175/-

is payable by the petitioner as urban land tax. Subsequently, on 15.10.1979 the petitioner submitted to the first respondent in the prescribed form No.35 the particulars for the sale of 6 grounds and 1600 sq.ft. comprised in Chesney West. This was followed up by the petitioner by letter, dated 15.10.1979 requesting the first respondent to make the assessment after giving effect to the sale in respect of which particulars had been furnished by the petitioner. Meanwhile the petitioner had paid urban land tax upto fasli 1388. Despite the fact that the petitioner had furnished the particulars of the land sold by it and had requested the concerned authorities to make the assessment in accordance therewith, in respect of fasli 1389, on 1.2.1980, the second respondent made a demand for a sum of Rs.10,173/- in accordance with the order dated 15.12.77 for an extent of 23 grounds and 465 sq.ft. The petitioner wrote a letter on 6.10.1980 to the effect that it was holding only an extent of 17 grounds and 1400 sq.ft. and that there was also an excess holding under the Urban Land Ceiling Act and further that that land was being held by the petitioner. Along with that letter, the petitioner also enclosed a list containing the names of persons in whose favour it had transferred the property as well as the other details of the documents under which the transfers were effected to about 20 persons. In response to this, the first respondent by letter L.Dis. B1/RR.50/80, dated 28.4.81 wrote to the petitioner referring to the application filed by the petitioner on 22.12.1979 for making the assessment after excluding the lands sold and stating that the application might be renewed after the disposal of the application filed by the petitioner claiming exemption under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. Again, for fasli 1391, a demand was made against the petitioner for the entire land and for the subsequent faslis also, similar demands were made. In this state of affairs, the petitioner has come up with this writ petition contending that the request for the re-assessment of urban land tax made by the petitioner in respect of the lands owned by it after excluding the portions sold had been unjustly turned down by the concerned authorities after returning Form No.35 and other documents sent by the petitioner.

2. In the counter filed by the respondents, they had taken up the stand that the modification or the cancellation of the assessment would arise only after the proceedings under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 came to a close and that the application made by the petitioner for re-assessment of urban land tax of its holdings after excluding the portions sold by it can be renewed after the disposal of the exemption application under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. Referring to two communications dated 28.4.1981 and 29.10.1982 sent by the respondents to the petitioner in this connection, the respondents reiterated that the petitioner has to renew its application for re-assessment after excluding the properties sold by it only after the termination of the proceedings claiming exemption under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978.

3. The principal contention of the learned Counsel for the petitioner is that whatever might have been the extent owned by the petitioner initially, that cannot be taken or followed as the basis for all the subsequent years also ignoring and overlooking the sales effected by the petitioner to several persons resulting in a diminution of the extent owned by the petitioner and after returning the particulars furnished by the petitioner in the prescribed form on the ground that the petitioner can seek a re-assessment only after the closure of the proceedings under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. On the other hand, the learned Additional Government Pleader submitted that so long as the petitioner continued to be the owner of the extent of the lands initially assessed to urban land tax, the petitioner was rightly assessed on the same basis for the subsequent years also and therefore, no exception could be taken to the assessments made on the petitioner.

4. It is common ground that under the

provisions of the Urban Land Tax Act only the owner of the urban land can be assessed. No doubt originally the petitioner owned a large extent of urban land which was assessed to urban land tax. Subsequently, the first respondent recognised the sale by the petitioner of an extent of 5 grounds and 1800 sq.ft. and proceeded to make an assessment with reference to that extent in the name of the petitioner and several others who had purchased an undivided interest therein. After so recognising the sale effected by the petitioner, only the balance was assessed to urban land tax in the hands of the petitioner. Under section 19 of the Tamil Nadu Urban Land Tax Act, 1966, the transferor and the transferee are obliged to give notice of the transfer to the Urban Land Tax Officer. There is no dispute in this case that periodically, as and when the petitioner disposed of the extent of land owned by it it had been intimating the concerned officers about the transfers effected and had also furnished the particulars in the prescribed form. Indeed it is seen from the letter dated 29.10.1982 sent by the first respondent to the petitioner that the Form 35 as well as the other documents sent by the petitioner and received by the first respondent had been returned and it is further mentioned therein that the petitioner can renew the request after orders are received from the Government on the exemption application filed by the petitioner. It is not the case of the respondents that the petitioner had not furnished any information about the transfers effected or the details thereof. On the contrary, it is clearly seen from the records that the petitioner had brought such transfers as were effected by it to the knowledge of the assessing authority and had furnished all the required details in the prescribed form and had made a request for re-assessment. But unfortunately the authorities have proceeded to return the particulars so furnished by the petitioner on the ground that it can be renewed after the disposal of the exemption application filed by the petitioner. In doing so, the respondents have penalised the petitioner for having adhered to the procedure laid down under the provisions of the Tamil Nadu Urban Land Tax Act which enjoins on the transferor as well as the transferee to furnish the details of the transfer and have proceeded to assess and levy on the petitioner urban land tax as if the petitioner continued to hold the same extent as before. This is not justified by any of the provisions of the Act. Apart from this, the granting or the rejection of the exemption claimed by the petitioner has really no bearing upon the assessment and levy of urban land tax on the petitioner with reference to the land held by it. If the exemption prayed for by the petitioner to hold land in excess of the urban ceiling is granted, then, the property would continue to belong to the petitioner and urban land tax would be payable by it with reference to such excess. If on the other hand, the exemption is not granted, then, till such time as a final notification is issued which will have the effect of divesting the excess from the petitioner, it will continue to remain the property of the petitioner. In my view, therefore, the pendency of the application for claiming an exemption is not really very relevant and cannot be used to throw out a reasonable request made by the petitioner for re-assessment of the urban land tax after giving effect to the transfers effected by it in the course of the subsequent years. The attitude of the respondents in continuing to assess the petitioner for urban land tax on the same holding as at the beginning without recognising the transfers effected by the petitioner is not only unreasonable, but is totally unsupportable under the provisions of the Act and as pointed out earlier, the petitioner has been made to pay almost a penalty for having conformed to the requirements of the provisions of the Act and the rules thereunder. Under those circumstances, the assessments made on the petitioner for faslis 1388 to 1394 cannot at all be sustained and they are quashed. The petitioner is directed to furnish the full and complete particulars of the sale of urban land effected by it year after year and in the prescribed form to the respondents herein as it had done already and after taking into consideration those details, the authorities will proceed to compute the holding of the urban land held by the petitioner every

year and thereafter proceed to levy the urban land tax on such holdings.

5. A faint attempt was made by the learned Counsel for the respondents to contend that the remedy of the petitioner would be to prefer an appeal against the orders of assessment and not to approach this Court for redress in a writ proceeding. This argument does not at all appeal to me. More so in a case like this where the authorities below have proceeded to adopt a method and manner of assessment which is alien to the provisions of the Act and have actually assessed the petitioner for several years in relation to urban land not owned by it. The respondents cannot fail to perform their statutory duty and at the same time say that the petitioner cannot approach this Court for remedying the wrong done. It has further to be borne in mind that the assessments made with reference to property not belonging to the petitioner are wholly illegal and without jurisdiction and not in conformity at all with the provisions of the Act and the petitioner cannot be told that even under those circumstances this Court will not exercise a discretion in its favour. On a careful consideration of all the facts and the circumstances, this is a fit case for the issue of a writ of *certiorari* to quash the assessments to urban land tax made on the petitioner for faslis 1388 to 1394 and to direct the authorities re-assess the urban land tax on the petitioner with reference to the land held by it for each one of those faslis after deducting the extent of land sold by the petitioner from fasli to fasli. The *rule nisi* is made absolute and the writ petition is allowed. There will be, however, no order as to costs.

R.S. .... *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S.Nainar Sundaram, J.*

*Appeal No. 1198 of 1979.

28th March, 1985.

Dhanasekaran *Appellant**

v.

Manoranjithammal and others *Respondents*

Hindu Minority and Guardianship Act (32 of 1956), section 8 (2) - Alienation of the minor's property by the guardian - Sanction of Court not obtained - Alienation not binding on the minor.

Held: It is well-settled that once a transfer is shown to be voidable at the instance of the minor, who may have become a major subsequently, it is voidable without any enquiry as regards the terms of the transfer, as to whether it was for binding necessity or for any other binding purposes. *[Para. 2]*

Section 8 (2) of the Hindu Minority and Guardianship Act lays down in specific and explicit terms that the natural guardian shall not, without the previous sanction of the Court, indulge in and effect any of the alienations set out in sub-clauses (a) and (b). Section 8 (3) of the Act is categoric leaving no room for any argument that any disposal of immovable property by a natural guardian in contravention of section 8 (2) is voidable at the instance of the minor. The arguments that such an alienation is for binding necessity and should be upheld are no longer available. When the inhibition is of the statute and it is plain and unambiguous it is not open to sustain an alienation done in contravention of it by still investigating and finding out justifying factors therefor. *[Para. 3]*

If this is the legal consequence that should flow, on the admitted facts of the present case, then the alienation by the first defendant in respect of the three-fourth share of the minor cannot be sustained and has to be ignored. *[Para. 6]*

The very object behind section 8 (2) and (3) is to recast the restrictions on the power of the natural guardian of a Hindu minor, more or less on the lines of similar restrictions of Act VIII of 1880. It must also be noted that in the present case, there is no claim for refund from the quandom minor of any tangible benefit alleged to have been received by him. *[Para. 5]*

Cases referred to:-

Sinaya Pillai v. *Munisami Ayyar*, 9 M.L.J. 64 : (1899) I.L.R. 22 Mad. 289; *Rameshwar Baksh Singh* v. *Mt. Ridh Kuer*, A.I.R. 1925 Oudh. 633; *Mohan Lal* v. *Mohammed Adil*, A.I.R. 1926 Oudh. 88.

A.V. Dhanakoti, for Appellant.

The Court delivered the following

JUDGMENT:- This appeal has to be allowed on legal point taken before me. The plaintiff, who is the appellant in this appeal, is the son of one Rajamanicka who died in March, 1960. The first defendant is his widow as well as the mother of the plaintiff. Impeaching a sale dated 2.8.1961, marked in the case as Exhibit B-4, effected by the first defendant for herself and on behalf of the plaintiff, who was then a minor, in favour of the second defendant, who was the younger brother of Rajamanicka, the plaintiff laid the suit for partition and separate possession of his three-fourth share in the suit properties. The first defendant remained *ex parte*. The substance of the defence of the second defendant. who died pending the suit and whose legal representatives were brought on record in the suit itself, was that the sale was for binding necessities. The Court below did not countenance the case of the plaintiff and dismissed the suit and that is how the plaintiff is before this Court by way of this appeal.

2. There is no need to investigate as to whether the sale was not for binding necessities and was tainted with vitiating circumstances as contended by the plaintiff, because the complaint, now legitimately put forth by Mr. A.V.Dhanakoti, learned Counsel for the appellant is that no sanction of Court was obtained by the first defendant, as contemplated under section 8 (2) of the Hindu Minority and Guardianship Act 32 of 1956, hereinafter referred to as the Act, for the alienation under Exhibit B-4 and hence, it is voidable at the instance of the plaintiff. That the plaintiff was entitled to three-fourth share in the suit properties is the finding rendered by the Court below. That finding is not being impeached before me by any process known to law. If this is so, on the date of the alienation, namely 2.8.1961, the Act was in force and there was the mandate of section 8 (2) of the Act requiring obtaining of sanction of Court for such sale and section 8 (3) of the Act lays down that an alienation in contravention of section 8 (2) is voidable at the instance of the minor-in the present case the plaintiff-who has subsequently become a major. There is no dispute that such sanction was not obtained. It is well settled that once a transfer is shown to be voidable at the instance of the minor, who may have become a major subsequently, it is voidable without any enquiry as regards the terms of the transfer as to whether it was for binding necessity or for any other binding purposes.

3. Section 8 (2) lays down in specific and explicit terms that the natural guardian shall not, without the previous permission of the Court, indulge in and effect any of the alienations set out in sub-clauses (a) and (b). Section 8 (3) is categoric leaving no room for any argument that any disposal of immovable property by a natural guardian in contravention of sections 8 (2) is voidable at the instance of the minor. The field and sphere of argument that such an alienation is for binding necessities and should be upheld are no longer available. When the inhibition is of the statute and it is plain and unambiguous, it is not open to sustain an alienation done in contravention of it by still investigating and finding out justifying factors therefor.

4. In *Sinaya Pillai* v. *Munisami Ayyar*, (1899) I.L.R. 22 Mad. 289 : 9 M.L.J. 64, in a case under similar provisions, sections

29 and 30 of the Guardians and Wards Act VIII of 1890, hereinafter referred to as Act VIII of 1890, a Bench of this Court, in spite of the fact that the necessity had been urgent, the terms of the deed were fair and the money had been duly applied, held that the transaction was voidable.

5. In *Rameshwar Baksh Singh v. Mt. Ridh Kuer*, A.I.R. 1925 Oudh. 633, a Bench of the Oudh Chief Court counternanced that under section 30 of Act VIII of 1890, an alienation without permission of Court is voidable and there is no need for further enquiry as to whether the terms were favourable to the minors or not. This ratio has been adopted by a subsequent pronouncement of another Bench of the same Court in *Mohan Lal v. Mohammed Adil*, A.I.R. 1926 Oudh. 88. In my view also, as expressed above, this ratio should govern. The very object behind section 8 (2) and (3) is to recast the restrictions on the powers of the natural guardian of a Hindu minor, more or less on the lines of similar restrictions in Act VIII of 1890. It must also be noted that in the present case, there is no claim for refund from the quandom minor of any tangible benefit alleged to have been received by him.

6. If this is the legal consequence that should flow on the admitted facts of the present case, then, the alienation by the first defendant under Exhibit B-4 in respect of the three-fourth share of the plaintiff cannot be sustained and has got to be ignored.

7. In the said circumstances, the appeal is allowed, the judgment and decree of the Court below are set aside; and there will be a decree in the suit, declaring that the alienation under Exhibit B-4 is not binding on the three-fourth share of the plaintiff in the suit properties and further, there will be a preliminary decree in the suit for partition and separate possession of the plaintiff's three-fourth share in the suit properties. In the peculiar circumstances of the case, I direct the parties to bear their respective costs throughout. Respondents 2 to 9 who are the legal representatives of the deceased second defendant shall pay the Court fee due to the State both in the suit as well as in this appeal.

R.S. .... *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)
Present:- *V. Ratnam, J.*
*Writ Petition No. 918 of 1983.
25th March, 1985.

The Management, Nagapattinam Permanent Fund Ltd., Nagapattinam *Petitioner**
v.
The Assistant Commissioner of Labour (Appellate Authority), (Under Tamil Nadu Shops and Establishment Act), Tiruchirapalli and another *Respondents*

Tamil Nadu Shops and Establishment Act (XXXVI of 1947), section 41 - Employee absenting without leave - Notice by employer calling for explanation - Enquiry by Board - Request by employee for being relieved from service - Acceptance of request by the Board - Termination of service - Validity.

The principal question for consideration was, whether the termination of the service of the employee-second respondent by his employer (a fund) was as a result of a request made in that regard by the second respondent and the acceptance thereof by the Fund.

Held:- The ordinary conduct of a person, who did not make the statement attributed to him would be to *(sic)* strongly protest against that. The second respondent had not done so. The probabilities are that the second respondent appeared before the Board of the Fund at the meeting held on 15th May, 1982 and expressed that he should be relieved subject, of course to his accounts being settled. Since the termination of services of the second respondent on the evidence in this case, was at his own request, he could not have really had any cause for complaint about the manner in which

Under these circumstances the order of the first respondent setting aside the order passed by the Fund terminating the services of the second respondent cannot be sustained. *[Para. 3]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in the proceedings of the first respondent herein T.N.S.E. Case No.16 of 1982, dated 12.11.1982 and to quash the same.

G.Rajan, for Petitioner.

J. Kanakaraj, Addl. Govt. Pleader (Writs), for 1st Respondent.

B.T. Sundaram for *M.Kalyanasundaram*, for 2nd Respondent.

The Court made the following

ORDER:- The second respondent herein, who was the Assistant Manager of the petitioner Permanent Fund, absented himself from duty without leave or permission from 6.5.1982 to 8.5.1982. An explanation was called for from him for his unauthorised absence from duty on the dates abovementioned and on 12.5.1982, the second respondent submitted an explanation setting out the circumstances under which he was obliged to be absent. That explanation was placed before the meeting of the Board of the Fund and a resolution was passed on 15.5.1982 terminating the services of the second respondent on the ground that the explanation submitted by the second respondent was not acceptable and the second respondent himself expressed a desire to be relieved on settlement of his accounts forthwith. A month's notice terminating the services of the second respondent with effect from 15.7.1982 was also given to the second respondent on 10.6.82. A reply was sent by the second respondent on 18.6.1982 to the effect that he had already explained the circumstances which obliged him to go on leave between 6.5.1982 to 8.5.1982 and that cannot be ... Thereafter, at a meeting of the Board of Directors of the Fund held on 13.7.1982, in accordance with the earlier notice sent by the Fund on 10.6.1982, resolution No.360 was passed terminating the services of the second respondent. A copy of that resolution along with a cheque for Rs.133.05 was sent by the Fund to the second respondent. On 19.7.1982, the second respondent, while acknowledging the letter dated 14.7.1982 sent by the Fund enclosing a copy of the resolution No.360 dated 13.7.1982, returned the cheque stating that he proposed to take further action in the matter. Thereafter, the second respondent preferred an appeal against the order of termination of his services before the first respondent herein contending that there had been no reasonable cause for disposing with his services and that he was also not guilty of any misconduct. While disposing of the appeal, the first respondent found that the second respondent had enough leave to his credit and even if there was a failure on the part of the second respondent to apply for an extension of leave, that would not be a reasonable cause for dispensing with the services of the second respondent. Adverting to the stand taken by the Fund that the second respondent was also relieved from the Fund on his own request expressed by him when he appeared on 15.5.1982, the first respondent found that though the second respondent did not deny his participation in the Board meeting on 15.5.1982, yet, in the absence of anything in writing to show that the second respondent expressed a desire to be relieved, the claim that the services of the second respondent were terminated on his own request cannot be upheld. In that view, the first respondent set aside the order of termination of the services of the second respondent. To quash this order, the petitioner has come up before this Court praying for the issue of a writ of *certiorari*.

2. The learned Counsel for the petitioner raised only one contention in support of this writ petition. According to him, at the time when the second respondent appeared before the meeting of the Board of the Fund on 15.5.1982, he had expressed

accepted by the Fund and in accordance therewith, the services of the second respondent were terminated and therefore, the second respondent cannot have any cause for complaint against the termination of his services by the Fund. Reliance in this connection was placed by the learned Counsel for the petitioner upon Exs. A-3, A-5 and R-5 as clearly establishing the inference that the termination of the services of the second respondent was also on his own request. On the other hand, the learned Counsel for the second respondent submitted that in the absence of anything in writing to show that the second respondent desired or wanted to be relieved, it cannot be said that his services were terminated at his own request and therefore, the order setting aside the termination of the services of the second respondent cannot be taken exception to.

3. Thus, the principal question that arises for consideration is whether the termination of the services of the second respondent in the Fund was as a result of a request made in that regard by the second respondent and the acceptance thereof by the Fund. There is no dispute that with reference to the absence of the second respondent from the Fund between 6.5.1982 and 8.5.1982, a charge memo was issued to him and he was also called upon to submit an explanation. Equally, there is no dispute that after having submitted an explanation, the second respondent had also appeared before the Board of the Fund at its meeting held on 15.5.1982. Indeed, in the order of the first respondent, it is stated that the second respondent did not deny his participation in the meeting of the Board of the Fund held on 15.5.1982. What transpired at that meeting remains to be considered. While, according to the Fund, the second respondent, when he appeared before the Board of the Fund at its meeting on 15.5.1982, expressed a desire to be relieved on settlement of his accounts, the second respondent would state that he did not make any such offer, though he was present on that day before the Board. It is in this connection that the three documents, reliance upon which was placed by the learned Counsel for the petitioner, are relevant. Ex.A-3 is the notice terminating the services of the second respondent. It is dated 10.6.1982. The second paragraph therein is significant. After referring to the absence of the second respondent between 6.5.1982 and 8.5.1982, the letter proceeds to state that the explanation dated 12.5.1982 submitted by the second respondent was not acceptable and that he had also expressed a desire to leave the Fund provided his accounts were settled forthwith. This letter winds up by saying that the second respondent is given a month's notice for termination of his services with the Fund with effect from 15.7.1982. Ex.A-4 dated 18.6.1982 is the reply sent by the second respondent to the Fund regarding the notice of termination dated 10.6.1982. Therein, the second respondent has reiterated the explanation already submitted by him on 12.5.1982 and has stated that the absence away from duty without leave between 6.5.1982 and 8.5.82 cannot be a reason for terminating his services, especially when he had put in 12 years and more of service under the Fund and when he had sufficient leave as well to his credit. There is no demur in Ex.A-4 that the second respondent did not express a desire to be relieved from the Fund on settlement of his accounts as stated in Ex.A-3. This conduct of the second respondent is very significant, in that, if really the second respondent did not express a desire to be relieved as stated in Ex.A-3, then, in his reply under Ex.A-4, he would have taken exception to this statement made in Ex.A-3 to the effect that he had expressed a desire to leave the Fund on settlement of his accounts. The ordinary conduct of a person, who did not make the statement attributed to him, would be to violently protest against that. The second respondent had not done so. This probabilises that the second respondent appeared before the Board of the Fund at the meeting held on 15.5.1982 and expressed that he should be relieved, subject, of course, to his accounts being settled. This is also further fortified by Ex.A-5 dated 14.7.1982. In that letter addressed by the Fund to the second respondent herein, a copy of the resolution No.360 passed by the Board at its meeting held

on 13.7.1982 had also been sent along with the cheque for Rs.133.05 towards the salary due to the second respondent. The copy of the resolution refers to the second respondent having appeared before the Board on 15.5.1982 and stated that if the amounts due to him are all paid, he had no objection to be relieved from the service of the Fund. Ex.A-5 letter terminating the services of the second respondent with effect from 15.7.82 and the copy of the resolution had been received by the second respondent as seen from Ex.A-6. While acknowledging the receipt of the letter dated 14.7.1982, the second respondent writes to state that he is returning the cheque as he proposed to take further action in the matter. Even in this letter under Ex.A-6, the second respondent has not in any manner chosen to question the correctness of the contents of the resolution referring to the second respondent's appearance before the Board of Directors on 15.5.1982 and expressing a desire to be relieved, if the amounts due to him are all settled and paid. In the absence, therefore, of any protest or objection raised by the second respondent either to Ex.A-4 or to Ex.A-6, it is not improbable that when the second respondent appeared before the meeting of the Board of the Fund on 15.5.1982, he had expressed his willingness to be relieved on payment of whatever amounts were due to him from the Fund. There is also one other circumstance which would further strengthen the expression of a desire to be relieved made by the second respondent before the meeting of the Board of the Fund on 15.5.1982. Ex.R-5 dated 3.9.1980 shows that the second respondent had explained certain charges already framed against him and had also indicated that the Secretary of the Fund was prejudicially disposed towards him. That letter winds up by saying that the second respondent had no objection to leave the Fund provided arrangements are made for the immediate refund of the security deposit with interest, and the Provident Fund contribution before leaving. The contents of Ex.R-5 also indicate that the second respondent has been contemplating the idea of quitting the services of the Fund even long before and when another opportunity in that regard presented itself on 15.5.1982, when he appeared before the Board with a view to substantiate his explanation for his absence without leave between 6.5.1982 and 8.5.82, he had reiterated his desire as shown by Exs.A-3 and A-5 and that had been accepted by the Board of Fund and the services of the second respondent have been terminated and this had also been communicated to the second respondent under Ex.A-3 and the resolution accompanying Ex.A-5 to which, as pointed out earlier, no exception was taken by the second respondent. A consideration of the aforesaid correspondence that passed between the petitioner and the second respondent clearly discloses that the termination of the services of the second respondent was only at his own request made by him at the time when he appeared before the Board of the Fund on 15.5.1982.

4. The first respondent in the course of its order was not inclined to accept the case of the Fund that the services of the second respondent were terminated on the ground that nothing had been taken in writing from the second respondent when he appeared before the Board. It was no doubt open to the Fund to have taken a letter in writing from the second respondent to the effect that he was being relieved from the services of the Fund on his own request. However, the absence of such a letter, in view of the correspondence that has been referred to already, would not negative the case of the Fund that the second respondent was relieved on his own request. The first respondent was also satisfied that there was evidence to show the expression of a desire by the second respondent to be relieved. But, however, the first respondent felt that that was not strong proof in the absence of evidence recorded at a properly constituted enquiry following the principles of natural justice. It is true that a letter written by the second respondent to the Fund expressing his willingness to be relieved, would be the strongest proof regarding the circumstances under which the second respondent's services came to be termina-

ted. But, if there is other evidence which would also point out that the termination of the services of the second respondent was pursuant to a request made by him in that regard, that evidence cannot be ignored merely on account of the fact that there is no letter in writing by the second respondent agreeing to be relieved provided his claims against the Fund are settled. It is also rather difficult to appreciate the need for an enquiry for terminating the services of the second respondent at his own request and the recording of evidence for that purpose. The evidence made available in the proceedings before the first respondent and referred to earlier, clearly establish that the Fund had acted upon the desire expressed by the second respondent before the Board at the time when he appeared on 15.5.1982 and the absence of a letter written by the second respondent to the Fund would not in any manner alter the position. Since the termination of the services of the second respondent, on the evidence in this case, was at his own request, he could not have really had any cause for complaint about the manner in which his services were terminated by the Fund. Under these circumstances, the order of the first respondent setting aside the order passed by the Fund terminating the services of the second respondent cannot be sustained at all. Consequently, the *rule nisi* is made absolute and a writ of *certiorari* will issue quashing the order of the first respondent herein in T.N.S.E.Case No.16 of 1982 dated 12.11. 1982. The writ petition will stand allowed. There will be, however, no order as to costs.

R.S. .... *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S. Nainar Sundaram, J.*

*Second Appeal No. 130 of 1982.
13th December, 1984.

M.D. Rajan *Appellant**

v.

I.T.C. Limited, represented by its Secretary, Calcutta-700 071 and others
Respondents

Contract of personal service - Employee in a company joining the Contributory Pension Fund - Whether entitled to remain in service till he attains the age of retirement.

Even if allowing an employee to join the Contributory Pension Fund amounted to an implied condition of the contract of service that he will be allowed to be in service till superannuation, it will still be a term of the contract of service and cannot elevate itself to a position better than that. In *Vaish College v. Lakshmi Narain*, (1976) 2 S.C.C. 58 : (1976) Lab. I.C. 576 : A.I.R. 1976 S.C. 888, the Supreme Court while enunciating the ratio has delineated three exceptions as the only contingencies which are outside the ordinary and normal rule against enforcing a contract of personal service. The exceptions are exhaustive and cannot be enlarged. *[Para. 5]*

Case referred to:-

Vaish College v. Lakshmi Narain, (1976) 2 S.C.C. 58 : (1976) Lab.I.C. 576 : (1976) 2 S.C.R. 1006 : A.I.R. 1976 S.C. 888.

P. Ramakrishnan, for Appellant.

S. Govind Swaminathan, for Respondents.

The Court delivered the following

JUDGMENT:- The plaintiff in the suit is the appellant in this second appeal. The respondents are the defendants in

the suit. The plaintiff laid the suit for a declaration that the order of termination dated 16.9.1976 issued by the first defendant is null and void and that the plaintiff shall be deemed to be in continuous employment under the first defendant company with effect from 1.4.1977 and for an injunction against the first defendant restraining it from operating the termination order dated 16.9.1976. On contest by the defendants, the plaintiff failed with regard to the reliefs asked for in the first Court. This result, the first Court arrived at, taking note of the ratio of the Supreme Court in the pronouncement in *Vaish College v. Lakshmi Narain*, (1976) 2 S.C.C. 58 : (1976) Lab. I.C. 576 : (1976) 2 S.C.R. 1006 : A.I.R. 1976 S.C. 888. However on additional Issue No. 2 as to whether the plaintiff's joining the contributory pension fund would entitle him to be in service till he attains the age of retirement notwithstanding the terms of contract, the first Court opined that the plaintiff will be so entitled.

2. The plaintiff appealed because he did not get the reliefs at the hands of the first Court. The lower Appellate Court assessed the facts of the case in the light of the principle enunciated by the Supreme Court and dismissed the appeal. On behalf of the defendants, it was urged that even the finding of the first Court on this additional Issue No.2 is not sustainable in view of the pronouncement of the Supreme Court. This objection has found counternance before the lower Appellate Court. Ultimately as stated above the appeal by the plaintiff was dismissed by the lower Appellate Court. Hence this second appeal.

3. At the time of the admission of the second appeal the following substantial questions of law came to be mooted out for consideration.

1. Whether the Courts below erred in law in not considering the plea of estoppel put forth by the plaintiff against the defendant?

2. Whether the Courts below have misconstrued and omitted to construe the material evidence on record when they negatived the case of the plaintiff? and,

3. Whether the Courts below are right in holding that the suit is not maintainable in the civil Court?

4. Exhibit A-4 dated 22.5.1962 is the contract of personal service entered into between the plaintiff and the second defendant, the Manager of the first defendant company. As per this document, there is no ambiguity that the contract is a contract of personal service. The order of termination dated 16.9.1976 as per Exhibit A-7 was issued as per clause 13 (a) of Exhibit A-4, the contract of personal service. The first defendant company is not a statutory body. It is only a company incorporated under the Companies Act. The ratio of the Supreme Court in the decision referred to above is clear and it has been set out in the following terms:

"On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognised exceptions:--- (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute."

5. If the above ratio is kept in mind, it is not possible to bring the case of the plaintiff within any of the exceptions countenanced as above. However, Mr. P.Ramakrishnan, learned Counsel for

the plaintiff, would state that though a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee even after having been removed from service can be deemed to be in service against the will and consent of the employer, says that in the present case, special and extraordinary circumstances do exist. Learned Counsel expatiates this by stating that the special circumstance is that the plaintiff was allowed to join the contributory pension fund and hence an assurance was made out that the plaintiff will be allowed to be in service until he attains the age of superannuation and practically this has become an implied condition of contract of service. Learned Counsel has to frankly admit that even this could only be a term of the contract of service, though not express, but implied. All said, the matter will come only as a condition of the contract of personal service and it cannot elevate itself to a position better than that. It is quite clear that while enunciating the ratio, the Supreme Court delineated three exceptions as the only contingencies which are outside the ordinary and normal rule against enforcing a contract of personal service. The exceptions are exhaustive and it is not possible to enlarge them. In this view, I am not able to find fault with the decisions rendered by the two Courts below, and accordingly this second appeal fails and the same is dismissed. I make no order as to costs.

R.S. .... *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *M.N. Chandurkar, C.J.*

*C.R.P.No. 4120 of 1984.
14th December, 1984.

S.Sundaram Pillai and others *Petitioners**

v.

P.Govindaswami and another *Respondents.*

Civil Procedure Code (V of 1908), sections 115, 151 and Order 39, rules 1, 2 and 7 - Mandatory injunction - Shares of registered companies standing in the name of the defendants - Plaintiffs claiming transfer of those shares - Plaintiff relying on agreement to transfer such shares which itself has to be established - Ad interim injunction directing the company to transfer shares and issue duplicate shares in respect of shares in question - Company directed to issue duplicate shares not made party to suit - Suppression of certain material facts of the defendant - Relevant provisions of the Companies Act not considered before making an order of transfer - Order of the trial Court set aside on appeal.

A mandatory injunction is an order compelling a defending to restore things to the condition in which they were when the plaintiff's complaint was made. A mandatory injunction can therefore be issued in order to compel the performance of certain acts in order to prevent the breach of an obligation which the Court is capable of enforcing. It is true that the obligation may flow from contract. But then an agreement enforceable at law has to be there between the parties on the basis of which the obligation can be ascertained. In the instant case the agreement on which the plaintiff is relying is itself to be established. *[Para. 17]*

The object of an injunction is prevention and the maintenance of the *status quo ante*. Normally this object is achieved by merely making a restrictive order which forbids the carrying out of a threat of injury,

or the repetition of an injurious act. In a given case, however, the acts committed by the defendant may leave an abiding injury and it may be difficult to restore the *status quo ante* unless that which has been done is undone. A mandatory injunction is issued to undo the effect of an injurious act. A very familiar example of such an injury is where the defendant erected a building which causes a perpetual obstruction to the access of light to the plaintiff's house to which amount of light he has a legal right. Mandatory injunction is granted only in rare cases and normally a mandatory injunction is granted, if at all only to restore the *status quo* and not to establish a new state of things differing from the state which existed at the date when the suit was instituted. The effect of a mandatory injunction so far as the defendant is concerned is more serious that in the case of a prohibitory injunction, because, where by a mandatory injunction the defendant is enjoined to do any particular act, he may be put to expenses and trouble which may be very considerable. That is why though the power to grant injunction has to be exercised with great caution, much greater caution is necessary in the case of making an order of mandatory injunction which is very rarely granted. *[Para. 18]*

The trial Court must exercise extreme caution and care before an order of injunction is made and it has to decide the question relating to the grant of an *ad interim* injunction according to well-established principles. The trial Court even at the time of making an order of injunction has to apply its mind seriously to the question whether the plaintiff has made out a *prima facie* case for grant of an injunction. The circumstances that an *ad interim* order can be vacated after the defendant appears and contests the correctness of the order of injunction is no justification for issuing an injunction as a matter of course. *[Para. 20]*

Cases referred to:-

Abdul Shukoor v. Umachander, (1976) 89 L.W. 330 : A.I.R. 1976 Mad. 350; *Maneckji Pestonji v. Wadilal Sarabhai & Co.*, I.L.R. 50 Bom. 360 : L.R. (1926) 53 I.A. 92 : 51 M.L.J. 1 : A.I.R. 1926 P.C. 38.

M.R. Narayanaswami, for Petitioner.

R. Gandhi, for Respondents.

The Court made the following

ORDER:- This revision petition is directed against a wholly unsustainable order which has the effect of divesting the petitioners of ownerships of 12,387 shares by an *ad interim* mandatory injunction which has been almost mechanically passed by the trial Court.

2. It is not necessary to go into the merits of the suit which the plaintiff-respondent 1 has filed in the City Civil Court, Madras, in which substantially the plaintiff's case is that the first and second defendants (Petitioners 1 and 2) on behalf of defendants 3 to 21 (Petitioners 3 to 21) in the suit had agreed to transfer to the plaintiff 16,387 equity shares of Messrs. Century Flour Mills Limited, Madras, respondent 2 herein.

3. Respondent 2 herein, is a public limited company hereinafter referred to as the Company, in which admittedly defendants 1 to 20 had obtained 12,387 shares in pursuance of an agreement between the plaintiff and defendants dt. 12.12.1976. One of the terms of the agreement dated 12.12.1976 was that the first, second and third defendants were to be made Directors, out of whom the first defendant was to be the full-time Director of the Company. The defendant 21 also owns 4000 shares in the company. According to the plaintiff, these shares were transferred to the defendant 1 in pursuance of an arrangement under which defendant 21 had advanced a loan to the plaintiff and it was agreed that the defendant 2 was to be eligible only to the interest and other benefits arising out of these shares. The plaintiff has already filed a suit C.S.No.458 of 1983 on the original side of this Court for a declaration of ownership of those shares and an injunction has been issued to the 21st defendant

restraining him from in any manner dealing with those 4000 shares. That order has later been vacated and an appeal filed by the plaintiff against the order vacating the injunction was later withdrawn.

4. The plaintiff's case is that at the annual general meeting held on 22.7.1983, the first three defendants were not elected as Directors and consequently the first defendant had automatically vacated office as whole-time Director of the Company. There is some dispute between the parties with regard to the meeting dated 22.7.1983 and some of the defendants including defendant 21 have already filed in this Court Company Petition No.17 of 1983 under sections 397 and 398 of the Companies Act.

5. It may be, at this stage, conveniently stated that in Company Application Nos. 397 and 398 of 1983 in Company Petition No. 17 of 1983, by an order dated 22.8.84, a learned single Judge of this Court has held that no valid annual general meeting was held on 22.7.1983 and that petitioners 1, 5 and 6 in the Company Petition,who are defendants 1, 2 and 3 in the suit, continued to be the Directors as per the unamended Article 97. The learned Judge has further held that since there was no annual general meeting on 22.7.1983 the term of Directors had to be reckoned from 30.9.1982. Accordingly, the learned Judge made an order that the respondents in the Company Petition would be restrained by an injunction from interfering in any manner with the three defendants functioning as Directors of the Company and the first defendant discharging his duties as whole-time Director of the Company. A further injunction was issued against the first respondent in the Company Petition from convening or holding meeting of the Board of the first respondent-company without due notice in writing by registered post to petitioners 1, 5 and 6 in the Company Petition. It appears that after this order was passed by the learned single Judge, the suit came to be filed on 6.9.1984 in which, surprisingly, no reference has been made to the order of the single Judge, but averments have been made to the contrary that the three defendants have ceased to be Directors of the Company. However, the substantial relief which is asked for in the plaint is that by way of settlement of some money transactions between the parties through the good offices of one Sri N.P.V. Ramaswamy Udayar, an agreement has been arrived at between the parties, by which the first two defendants, on behalf of the remaining defendants, agreed to transfer 16,387 equity shares of the company to the plaintiff. The details of the holding of each of the defendants were given in the plaint as a Schedule. These are not relevant for the purpose of this revision petition. It was also alleged that some cash payments were made and since the defendants were not transferring the shares, the plaintiff was forced to file the suit. In the suit, as many as eight substantive reliefs had been sought. The main relief is one of declaration that the plaintiff is the owner of 16,387 equity shares of Messrs. Century Flour Mills Limited, Madras. The other relief is for a direction to the defendants to deposit the share certificates in the Court. The third relief is that the defendants should deposit the shares transfer forms of the shares and the company should be prohibited from entertaining any application for transfer in the name of any person other than the plaintiff. There was also a prayer for direction to the company to issue duplicate shares in lieu of 12,387 shares standing in the name of defendants 1 to 20. In his own right, defendant 21 had 4,000 shares. A direction was sought against defendant No.21 for transferring those 4,000 shares. An additional relief was sought, namely, that defendants 1 to 20 should be restrained from dealing in any manner with 12,387 shares by way of sale, hypothecation, pledge, mortgage, transfer, etc., till the final disposal of the suit. An injunction was also sought that defendants 1 to 20 should be restrained from exercising their voting rights in respect of the said 12,387 shares.

6. At this stage, it has to be mentioned that in Company Petition No.17 of 1983, the plaintiff in this suit has filed an

application for recording the terms of the compromise, under which, according to the plaintiff, the defendants were under an obligation to transfer the shares. This application is C.A.No.583 of 1984 (Page 19 of the paper book). In this application, the details as to the compromise have been given and it is stated that several drafts were exchanged between the parties and the final terms arrived at between the plaintiff and defendants 1 to 3 were recited. It was stated that the defendants were unwilling to abide by the terms and that is why it became necessary to file the application for directions under rule 9 of the Company Court Rules and Order 23 and rule 3, Civil Procedure Code, read with section 402 of the Companies Act to record the compromise and issue suitable directions giving effect to the terms concluded between the parties. A Judge's summons was taken out. For this purpose, along with the affidavit, "memo of settlement arrived at between the petitioner and respondents" was filed. This was done in August, 1984, *i.e.*, prior to the suit. However, this finds no reference in the plaint itself.

7. Now, on the day on which the suit was filed, three separate interim applications came to be filed by the plaintiff, *viz.*, I.A.Nos. 16444, 16445 and 16446 of 1984. There is an endorsement of I.A.No. 16444 of 1984 that application was received at 5 p.m. on 6.9.1984. Since chronologically the other two applications bear later numbers, at best, they must have been received at the same time or a few minutes later. On receipt of these three applications which have endorsements of the Counsel that there is no caveat in the suit register, the Registry seems to have registered those applications and they were put up before the Court almost immediately. The endorsements made by the Registry on the three applications were, therefore, to have taken some time and all this obviously happened after 5 p.m. The learned Judge granted all the three applications by making interim orders also almost immediately after they were filed and the three orders are identical in terms. It is enough to reproduce the order on I.A.No.16444 of 1984 which reads as follows:-

> "...Heard; perused case records. Satisfied that the object of granting the interim injunction would be defeated by the delay. Hence *ad interim* injunction and notice: 8.10.84.
>
> Sd.......
> 8.9.1984."

8. There is intrinsic evidence in this record to indicate how mechanically these orders have been made without any application of mind, because the order in I.A.No.16446 of 1984 renders wholly ineffective, the orders made on Applications Nos. 16444 and 16445 of 1984 on the same day and at the same time. Application No.16444 of 1984 was intended for the relief of an *ad interim* injunction restraining the defendants 1 to 20 from disposing of in any manner 12,387 shares by sale, mortgage, gift, pledge or otherwise till the disposal of the suit. This order which is at page 73 of the paper book had in effect frozen the shares. I.A.No.16445 of 1984 was made for an *ad interim* injunction restraining defendants 1 to 20 from exercising voting rights in respect of 12,387 shares of Messrs. Century Flour Mills Limited. The occasion for exercising voting rights would arise only if and when a meeting of shareholders would be held. This injunction was granted and defendants 1 to 20 were restrained from exercising voting rights in respect of the disputed shares. The combined effect of these two orders is that defendants 1 to 20 were prevented from exercising their rights as either shareholders or the first three defendants functioning as Directors of the Company. Also virtually, the effect of these two orders was that the order of the learned single Judge in Company Applications Nos.397 and 398 of 1983 which was made about two weeks prior to the date on which the trial Judge granted injunction was completely set at naught. It is also obvious that these orders were obtained by the plaintiff without disclosing the fact that there was already an order of the High Court holding that the three defendants continued to be Directors of the Company.

9. What is surprising is that after having

made these orders, the learned Judge has also made an order, which is challenged in this revision petition, on the same day directing Century Flour Mills Limited, which is described as "Garnishee", "to issue forthwith duplicate shares in respect of 12,387 shares of Messrs. Century Flour Mills Limited standing in the name of defendants 1 to 20" to the plaintiff. The learned Judge has made a further order directing that the said 12,387 shares should be immediately transferred in the name of the plaintiff. The result of this order is that there are now no shares in respect of which the order made on the two earlier applications on which those orders can operate. The effect of this order also is that the suit filed by the plaintiff substantially stands decreed on the very day on which the suit has been filed at the end of the day. This order of mandatory injunction has been challenged in this revision petition.

10. When the matter came up for admission, since allegations were made against the learned Judge in the memorandum of revision as well as in the complaint made to me for being dealt with administratively that the injunction order was made after Court hours and without notice to the parties who would be seriously affected by such an injunction, I directed the learned Judge to make a report as to how such an order came to be passed *ex parte*. The learned Judge has sent a report that at the time when he made the order he was satisfied that the object of granting the order would be defeated by the delay and that he *bona fide* thought that an interim order could be made which could be reversed. In this report, however, he has further stated that he now realizes that he should not have passed the *ad interim* order of mandatory injunction.

11. Mr. Gandhi who appears on behalf of the original plaintiff, has, at the outset, contended that the revision petition filed by the defendants should be dismissed, because no appeal or revision petition lies against an interim order, and he has placed reliance on a Division Bench decision of this Court in *Abdul Shukoor v. Umachander*, (1976) 89 L.W. 330 : A.I.R. 1976 Mad. 350. The Division Bench has, in *Abdul Shukoor's case*, (1976) 89 L.W. 330 : A.I.R. 1976 Mad. 350, held that no appeal will lie against an *ex parte* and *ad interim* injunction but the specific remedy available in Order 39, rule 4, Civil Procedure Code, has to be availed by the interdicted party so that a final reasoned order could be obtained in the trial Court itself against which the Code has provided an obvious appeal under Order 43, rule 1(r), Civil Procedure Code. That was a case in which against an *ad interim* temporary injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property the defendants filed an appeal before the Subordinate Judge and the Subordinate Judge passed an order suspending the interim injunction. This order of the Subordinate Judge was challenged in the revision petition. While holding that the order of *ad interim* injunction was not appealable, the Division Bench held that the order of the Subordinate Judge was absolutely without jurisdiction, because no appeal lay against the *ad interim* order and the order of the Subordinate Judge was set aside. Now, it is true that the Division Bench has has held in *Abdul Shukoor's case*, 89 L.W. 330 : A.I.R. 1976 Mad. 350, that no appeal lies against an order of *ad interim* injunction. But, to accept the contention of the plaintiff in the present case that the defendants should first appear before the trial Court and move the trial Court for setting aside the injunction, would really have the effect of permitting the plaintiff to have the benefit of an order which is patently erroneous and to say the least, perverse and has been obtained by suppressing material facts. In any case, the High Court, in the exercise of its revisional jurisdiction under section 115 of Civil Procedure Code, cannot allow an order, which amounts to an abuse of the powers vested in the trial Court, to stand once such an order comes to the notice of the High Court.

12. It is apparent that there are several infirmities in the order of an interim mandatory injunction made by the trial Court. The petition seeking an order of

ad interim mandatory injunction purports to have been made "under section 151, Civil Procedure Code read with Order 39, rule 7". Originally, the petition appears to have been made under Order 39, rules 1, 2 and 7, but the figures "1, 2" and the word 'and' have been struck off. Now it is true that if there is a power in the Court to grant a relief, mention of a wrong provision of law in the petition will not deprive a party of his right to a relief if he is otherwise entitled to such relief. But when positively a petition is filed under Order 39, rule 7, Civil Procedure Code, the learned Judge should have applied his mind to the question as to whether the case before him really fell within Order 39, rule 7, Civil Procedure Code. Order 39, rule 7, Civil Procedure Code, which has the marginal heading "Detention, preservation, inspection, etc., of subject-matter of suit", enables the Court to make three kinds of orders specified in Clauses (a), (b) and (c). Order 39, rule 7 (1), Civil Procedure Code, reads as follows:-

> "7(1). *The Court may on the application of any party to a suit, and on such terms as it thinks fit*—
>
> (a) make an order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
>
> (b) for all or any of the purposes aforesaid authorises any person to enter upon or into any land or building in the possession of any other party to such suit; and
>
> (c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information of evidence."

Mr. Gandhi appearing on behalf of the plaintiff was fair enough to concede that the *ad interim* mandatory injunction could not have been asked for under Order 39, rule 7 of the Civil Procedure Code at all. The learned Judge has obviously not applied his mind to the correct provision of law under which the plaintiff was asking for an order of an *ad interim* mandatory injunction.

13. The second infirmity in the order is that the order of *ad interim* mandatory injunction is made against "Messrs. Century Flour Mills Limited" which is not even a party to the suit. Messrs. Century Flour Mills Limited is a public limited company and merely by adding the name of Messrs. Century Flour Mills Limited as respondent 22 in the petition for *ad interim* mandatory injunction it would not empower the Court to issue an injunction against Messrs. Century Flour Mills Limited directing it to issue duplicate shares. In para. 10 of his affidavit in support of his application in I.A.No. 16446 of 1984, the plaintiff has stated--

> "I am taking this application impleading M/s. Century Flour Mills Ltd., having its registered Office at Indian Chamber Buildings, First Floor, Esplanade, Madras-600108 as the garnishee so as to help this Hon'ble Court to pass necessary orders directing the garnishee M/s. Century Flour Mills Ltd., Madras to issue duplicate shares in respect of 12,387 shares standing in the name of defendants 1 to 20 and also direct the garnishee M/s.Century Flour Mills Ltd., Madras, to transfer the 12,387 shares in the name of the plaintiff and save him from irreparable loss."

It is not known as to how Messrs. Century Flour Mills Limited was described as a "garnishee" and in what proceedings Messrs. Century Flour Mills Limited was a garnishee. Technically, assuming that M/s. Century Flour Mills Limited was under the control of the plaintiff, the trial Court could not have made an order of *ad interim* mandatory injunction without M/s. Century Flour Mills Limited being a party to the suit. The fact that an *ad interim* order of mandatory injunction has been made against the company which is not even a party to the suit and not against the defendants, itself indicates that the interim mandatory injunction has been issued in a most casual manner without any application of mind.

14. The learned Judge seemed to have completely lost sight of the fact that the *ad interim* order of mandatory injunction was in this case of a very peculiar type and the right of the plaintiff to get such an *ad interim* injunction could not be determined without reference to the provisions of the Companies Act. The right of a party to have duplicate shares issued or to have his name entered in the Register of Members of a public limited company has to be determined with reference to the provisions of the Companies Act. The 'shares' in a company is movable property. Section 82 of the Companies Act provides that the shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company. Transfer of shares is a matter in respect of which there is an express statutory provision in section 108 of the Companies Act. Section 108 (1) which provides that the transfer of a share is not to be registered except on production of instrument of transfer, reads as follows:-

> "A company shall not register a transfer of shares in, or debentures, of, the company unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence, along with the letter of allotment of the shares or debentures:
>
> Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of transfer, it is proved to the satisfaction of the Board of Directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit:
>
> Provided further that nothing in this section shall prejudice any power of the company to register as a share-holder or debenture-holder any person to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law."

This provision shows that a company is prohibited from registering the transfer of shares in the company unless there is a proper instrument of transfer which is duly stamped and which is executed by or on behalf of the transferor and by or on behalf of the transferee is delivered to the company along with the certificate relating to the shares or debentures as the case may be. However, under the proviso, if it is proved to the satisfaction of the Board of Directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the Board may think fit, but this can be done only on an application in writing to the company by the transferee and bearing the stamp required for an instrument of transfer. However, if the shares of a company have been transmitted by operation of law, the company is entitled to register as shareholder or debenture holder the person to whom the shares have been transmitted by operation of law. Sub-section (1A) of section 108 requires the instrument of transfer of shares to be in the prescribed form. There is an elaborate procedure prescribed under section 108 which has to be complied with before a transferee of a share could have his name registered in the Books of the company. The provisions of section 108 would therefore show that the title of the transferee to get on the register of shareholders consists in the possession of the share certificates, together with the transfer form signed by the registered holder - *See Maneckji Pestonji v. Wadilal Sarabhai & Co.*, 53 I.A. 92 : 51 M.L.J. 1 : I.L.R. 50 Bom. 360 : A.I.R. 1926 P.C. 38. The combined effect of section 82 read with section 108 of the Companies Act is that though the shares of a company are 'movable' property, in so far as the

company is concerned, unless there is a valid deed of transfer in accordance with section 108 of the Companies Act, the transferee cannot claim to have his name entered in the Register of Members of the Company.

15. Even so far as issue of duplicate shares of the company is concerned, the right to get a duplicate share is regulated by section 84. Under section 84 (1) a certificate, under the common seal of the company, specifying any shares held by any member, is *prima facie* evidence of the title of the members to such shares. Sub-section (2) of section 84 reads as follows:-

> "*A certificate may be renewed or a duplicate of a certificate may be issued if such certificate*—
>
> (a) is proved to have been lost or destroyed, or
>
> (b) having been defaced or mutilated or torn is surrendered to the company."

The learned Judge has not considered the effect of section 84 or section 108 of the Companies Act when he went on to make an order that duplicate shares should be issued and the said shares should be immediately transferred in the name of the plaintiff. The learned Judge was bound to consider whether he could issue an injunction against a company which is not a party and whether the plaintiff was entitled to by-pass the provisions of the Companies Act when he asked for the several reliefs as prayed in the plaint. He should have considered these matters on his own even if the plaintiff's Counsel had not referred to them.

16. Important questions of law are involved in the suit. The plaintiff's right to get the ownership of the shares in question itself is not beyond doubt. Such a right is not founded on any document and will have to be decided only on oral evidence. It could not even be *prima facie* said that the plaintiff had any present undisputed right on the basis of a compromise which even according to the plaintiff himself, the concerned defendants were not accepting. There was clear suppression of facts on the part of the plaintiff when he did not disclose to the Court the fact that he had applied for the alleged compromise being recorded in the company Court. He has also not disclosed that there was already an adjudication in the company Court before the filing of the suit (and) that the three defendants continue to be the Directors of the company. Injunction is an equitable relief and the suppression of the above facts was, in my view, enough to deprive the plaintiff of the right to get the relief of injunction.

17. There are not only disputed questions with regard to the present right of the plaintiff to the ownership of the shares in question, but as already pointed out, important questions of law are involved in respect of the provisions of the Companies Act, and it was wholly improper on the part of the trial Court to make an order of *ad interim* mandatory injunction in the present case. A mandatory injunction is an order compelling defendant to restore things to the condition in which they were when the plaintiffs complaint was made. Salmond defines 'Mandatory Injunction' as "an order requiring the defendant to do a positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfilment of the legal obligations, for example, an order to pull down a building which he had already erected to the obstruction of the plaintiff's lights". Mandatory injunctions are dealt with by section 39 of the Specific Relief Act which reads as follows:-

> "When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

A mandatory injunction can therefore be issued in order to compel the performance of certain acts in order to prevent

the breach of an obligation which the Court is capable of enforcing. It is true that the obligation may flow from a contract. But then, an agreement enforceable at law has to be there between the parties on the basis of which the obligation can be ascertained. In the instant case, the agreement on which the plaintiff is relying is itself to be established.

18. The object of an injunction is prevention (*sic*) and the maintenance of the *status quo ante*. Normally this object is achieved by merely making a restrictive order which forbids the carrying out of a threat of injury, or the repetition of an injurious act. In a given case, however, the acts committed by the defendant may leave an abiding injury and it may be difficult to restore the *status quo ante* unless that which has been done is undone. A mandatory injunction is issued to undo the effect of an injurious act. A very familiar example of such an injury is where the defendant erected a building which causes a perpetual obstruction to the access of light to the plaintiff's house, to which amount of light he has a legal right. In such a case, it is obvious that restoration of the parties to their former condition is impossible except by ordering the demolition of the building. Sometimes in order to prevent the breach of the legal right and to compel the performance of certain acts the defendant is ordered to undo that which he has done. A mandatory injunction is granted only in rare cases and normally a mandatory injunction is granted, if at all, only to restore the *status quo* and not to establish a new state of things differing from the state which existed at the date when the suit was instituted. The effect of a mandatory injunction so far as the defendant is concerned is more serious than in the case of a prohibitory injunction, because, where by a mandatory injunction the defendant is enjoined to do any particular act, he may be put to expenses and trouble which may be very considerable. That is why, though the power to grant injunction has to be exercised with great caution, much greater caution is necessary in the case of making an order of mandatory injunction which is very rarely granted.

19. The present case is an illustration of what harm a mandatory injunction can cause when passed in a casual manner, as a matter of course. The plaintiff has still to establish his right to the shares in question. The factum of the compromise in pursuance of which the plaintiff claims that the defendants had promised to transfer the shares to him, is itself the subject-matter of an application under Order 23, rule 3, Civil Procedure Code, before the Company Court. The averments in the plaint which will have to be established before the plaintiff can claim any right to the shares in question, are disputed questions of fact on which evidence will have to be recorded when the suit goes to trial, because the main issue in the suit is the factum of the compromise on which the plaintiff relies. Even on the averments in the plaint it cannot be said that the plaintiff has made out any *prima facie* case for a mandatory injunction and yet the defendants have been summarily divested of the ownership of the shares in question of the value of more than Rs.10 lakhs by one stroke of the pen of the learned Judge. In the view I have taken, the order of mandatory injunction made by the trial Court is set aside and the application No.16446 of 1984 is rejected.

20. Before parting with the case, it is necessary to observe that the trial Courts realise that injunctions, whether prohibitory or mandatory, should not be granted as a matter of course and the trial Court must exercise extreme caution and care before an order of injunction is made and it has to decide the question relating to the grant of an *ad interim* injunction according to well established principles. The trial Court, even at the stage of making an *ad interim* order of injunction, has to apply its mind seriously to the question whether the plaintiff has made out a *prima facie* case for the grant of an injunction. The circumstance that an *ad interim* order can be vacated after the defendant appears and contests the correctness of the order of injunction is no justification for issuing an injunction as a matter of course.

21. Accordingly, the order of the trial

Court made in I.A.No. 16446 of 1984 is set aside. The revision petition is allowed with costs. Counsel's fees are computed at Rs.500/-

22. I am informed that the defendants have already moved the Company Court for the transfer of the suit to its file. Having regard to the manner in which the trial Court has dealt with the matter, it will be in the interest of justice to withdraw the suit from that Court and transfer the suit to the file of the Principal Judge, City Civil Court. Till such time as the Company Court decides the application for transfer of the suit from the City Civil Court to the High Court, the suit shall now be tried by the Principal Judge, City Civil Court, Madras. If the suit is not transferred to the High Court, the suit will continue for trial in the Court of the Principal Judge.

R.S. .... *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *V.Ramaswami and David Annousamy, JJ.*

*W.A.Nos. 1040/83 and 319/84 against W.P.Nos. 5633/83 and 1954/83 respectively.
12th February, 1985.

N.R. Chinnasamy Chettiar and another *Appellants**

v.

The State of Tamil Nadu, represented by the Secy. to Govt. Home (Cinemas) Dept., Fort St. George, Madras-9 and others *Respondents*

(A) Tamil Nadu Cinemas (Regulation) Act (9 of 1955), section 9-B - Revisional Authority - Whether should give reasons in an order of affirmance.

Under section 9-B of the Tamil Nadu Cinemas Regulation Act, a revision by the Government, can take place on their own motion or on application. When the matter is taken up by the Government on their own motion, nobody also is interested to know about the decision of affirmance. But when the revision is effected on the application of an aggrieved party, that party is entitled to know whether the revisional authority satisfied itself and how it satisfied itself. *[Para. 14]*

In this connection, it is worth remembering that all decisions by public bodies are vicarious ones. They are taken on behalf of the people by an authority appointed directly or indirectly by the people. So the people have a right of superintendence to satisfy themselves about the acceptability of the decision and for that purpose the reasons leading thereto should be disclosed. Apart from the general public, some individuals may specifically, be interested in the decision when they are susceptible of affecting their legitimate interest. Before a decision is taken, they are entitled to put forth their point in order to influence the decision to their advantage and when the decision is taken, they are naturally interested to know the reasons for the decision especially if it is not to their expectation. *[Para. 15, 16]*

The very fabric of democracy or the Government by the people implies that all decisions of public bodies are transparent, so that the people know fully how, why and what for the decision has been taken. Such a transparency is the best guarantee that the decision has been arrived at after taking into account all the circumstances and after giving due weight to each of these circumstances and also that no external consideration nor oblique motive has been operative in the mind of the authority deciding on behalf of the people. Transparency of decisions has also the advantage of shielding the decision of public bodies against unnecessary suspicion or criticism which otherwise would hang over those decisions and impair their strength. *[Para. 17]*

(B) Tamil Nadu Cinemas (Regulation) Act (9 of 1955), section 9 (b) - Order of the revisional authority - Not containing any reason - Effect - Constitution of

India (1950), Article 226 - Petition for issue of certiorarified mandamus allowed.

Though the order is judicial in nature, it is not processed through in the same manner as in a judicial forum. The Government have got their own method of working, as per which the authority vested with power of decision comes to such a decision upon the perusal of the notes prepared by the Secretariat and the perusal of the records. In such a case, when the order communicated to the party does not by itself contain the reasons, it is necessary to ascertain whether the reasons are not to be found in the relevant file. That is why the aggrieved party in such a case would pray the Court to call for the records relating to the decision. When the records are so called for and when it is found that no reasons are found therein, this Court would be left with no option but to set aside the order, since it has no possibility to assess the merit thereof. If on the contrary there are reasons, the Court would see whether the grounds of revision have been properly considered and whether the final decision is in accordance with that consideration. Even if this Court is satisfied that the order is unimpeachable on the basis of the reasons so discovered one has to note that the revision petitioner would have, however suffered prejudice on account of the absence of reasons in the order itself.

Though it was found in the instant case from the records that the impugned orders were not without reasons and therefore they were not bad, if however, the absence of disclosure of reasons in the orders themselves had compelled the petitioners to have the records called for and in that process they had incurred expenditure they would be entitled to compensation for the same. *[Para. 23]*

Cases referred to:-

Alagiri v. Collector, Thanjavur, I.L.R.(1983) 1 Mad. 176 : A.I.R. 1983 Mad. 134; *M.I. Industries v. Union of India,* (1966) 1 S.C.J. 204 : (1966) 1 S.C.R. 466 : A.I.R. 1966 S.C. 671; *Bhagatraja v. Union of India,* (1968) 1 S.C.J. 431 : (1968) 1 M.L.J. (S.C.) 77 : (1968) 1 An.W.R. (S.C.) 77 : (1967) 3 S.C.R. 302 : A.I.R. 1967 S.C. 1606; *Som Datt v. Union of India,* (1969) 1 S.C.J. 835 : (1969) M.L.J. (Crl.) 447 : (1969) 2 S.C.R. 177 : A.I.R. 1969 S.C. 414; *Mahabir Prasad v. U.P. State,* (1971) 1 S.C.J. 256 : (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302; *Ranganathan v. Daulatrao,* (1975) 1 S.C.C. 696 : (1975) 3 S.C.R. 99 : A.I.R. 1975 S.C. 2146; *Siemens Engineering & Manufacturing Company of India v. Union of India,* (1977) 1 S.C.J. 116 : (1976) 2 S.C.C. 981 : A.I.R. 1976 S.C. 1785; *Tara Chand v. Delhi Municipality,*(1977) 1 S.C.R. 638 : (1977) Lab. I.C. 55 : (1977) 1 S.C.C. 472 : A.I.R. 1977 S.C. 567; *M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar,*(1980) 2 R.C.J. 165 : A.I.R. 1980 S.C. 1253.

Appeals under clause 15 of the Letters Patent against the order of Mr. Justice Mohan, dated 30.9.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.5633/83 presented to this Court, under Article 226 of the Constitution of India, to issue a writ of *certiorarified mandamus*, calling for the records of the 1st respondent in Letter No.16565/Cinemas/83-7 Home (Cinemas) Department dated 14.6.1983 and that of the 2nd respondent in D.Dis.Cinema Appeal No.170/82 dated 26.1.1985 and of the third respondent in R.Dis.No.41919/81 dated 11.10.1982 and quash the said order of the 1st respondent in Letter No.16565/Cinemas/83-7/ Home (Cinemas) Department, dated 14.6.83 and direct the 3rd respondent to issue No Objection Certificate in favour of the petitioner for locating a Touring Cinema in Nachanapatti Village in Omalur Taluk, Salem District (in W.P.No.5633/83 and of (2) Mr. Justice Venkataswami, dated 29.2.1984 and made in the exercise of the Special Original Jurisdiction, of the High Court in W.P.No.1954/83 presented under Article 226 of the Constitution of India, to issue a writ of *certiorari*, calling for the records relating to the order of the respondent Letter No.165441/ Cinemas/82-4, confirming the order of the second respondent in Cinemas Appeal No.130/82, dated 21.12.1982 and quash the same.

P.Chidambaram, for Appellants.

N.R. Chandran, Addl. Govt. Pleader, for Respondents 1 to 3.

C.S. Prakasa Rao for *Mrs. T.N.Ananthanayaki*, for 4th Respondent in W.A.No.1040 of 1983.

D.Raju, for *R.D. Indrasenan*, for 4th Respondent in W.A.No.319 of 1984.

The Judgment of the Court was delivered by

DAVID ANNOUSSAMY, J.:- In these two appeals against two judgments by different single Judges the point for determination is the same. Hence, both of them have been argued together and are disposed of by this common judgment.

2. In W.A.No.1040 of 1983 the facts are summarily as follows:- The fourth respondent applied for the grant of 'NO OBJECTION CERTIFICATE' to locate a touring cinema in S.No.71/1 In Nachanappatti Village, Omalur taluk. The appellant also applied for the same grant. The applications were preferred under rule 35 in Form A Part-II of the Tamil Nadu Cinematograph Rules. Notices inviting objections were published in the Office of the Panchayat Union, Kadayampatti on 25.4.1981 and in the Salem District Gazette dated 21.5.1981. The Collector after considering all the objections received, preferred the fourth respondent to the appellant, whose application was rejected. An appeal was preferred to the Commissioner of Land Administration, Madras, who confirmed the order of the Collector on 26.1.1983. On revision, the Government found that there was no ground to interfere with the orders of the Commissioner of Land Administration. In the writ petition the appellant herein challenged the order of the Government on merits as well as on the ground that the order of the Government does not disclose the reasons. The learned Single Judge considered all the points raised as regards the merits of the case and found that the decision of the Collector preferring the fourth respondent to the appellant as confirmed by the appellate authority and revisional authority did not suffer from any infirmity or irregularity. As regards the second ground he held that the revisional authority while dismissing the revision need not give reasons and added that on the perusal of the records it was found that the government considered the revision petition with sufficient care after calling for a report and declined to interfere, being satisfied that there were no merits in the petition.

3. The facts relating to W.A.No.319 of 1984 are summarily as follows:- The fourth respondent was the beneficiary of a licence to run a touring cinema in R.S.No.1961/A of Kulathupalayam Village, Dharapuram Taluk. That licence having expired he applied for renewal of the licence to run the touring cinema for a further period of three years on the same site. Objections were invited and after considering them the Collector refused to grant 'C' Form licence to the fourth respondent by an order, dated 15.7.1981. The fourth respondent preferred an appeal before the Commissioner of Land Administration, Chepauk, Madras. After hearing the parties concerned, the Commissioner of Land Administration by order, dated 3.9.1981 remanded the matter for fresh examination to verify whether the site and the building conformed to the relevant rules in every aspect. The Collector obtained a report from the concerned Officer, inspected the site personally and after hearing the parties concerned rejected again the application of the fourth respondent. The fourth respondent appealed for the second time before the Commissioner of Land Administration, Madras, who also inspected the site in the presence of the Counsel for the objectors and the fourth respondent as well as the owner of the site and passed a detailed order stating that there was substantial compliance of the rule and granted the 'C' Form licence to the fourth respondent. The appellant felt aggrieved by that order and preferred a revision before the government, which by its order dated 16.2.1983 found that there was no ground to interfere. That order was challenged by way of writ before this Court on merits as well as on the point that the order of the Government was liable to

be quashed for its being a non-speaking order. The learned Single Judge, who heard the writ petition, after analysing all the points submitted before him, on merits found that the order granting licence to the fourth respondent did not suffer from want of jurisdiction or any error apparent on the face of the record making it liable to be quashed. As regards the technical ground relating to the content of the order, after reviewing the decisions on that point by this Court on earlier occasions the learned Judge came to the conclusion that the preponderance of authority was in favour of the view that the confirming revisional order need not be a speaking order.

4. The common point raised in both the appeals is that the revisional authority exercising a quasi-judicial power should disclose the reasons in its order and that in the absence of such disclosure the order was vitiated and was liable to be set aside for that reason.

5. The answer of the learned Additional Government Pleader is that when the revisional authority confirms the order of the appellate authority, it need not give reasons of its own. This controversy is not a new one. It has been brought before Courts several times and it will not be out of place to review summarily the decisions of Single Judges of this court and to set for the rulings of the Supreme Court on this point.

6. In W.P.No.10157 of 1981 dated 22.10.81 a Single Judge of this Court held that the revisional authority acting under section 9-B of the Tamil Nadu Cinemas (Regulation) Act, 1955, need not give reasons in an order of affirmance. In another decision reported in *Alagiri v. Collector, Thanjavur*, I.L.R. (1983) 1 Mad. 176 : A.I.R. 1983 Mad. 134, a Single Judge of this Court while dealing with a writ petition arising out of an order of revision under the Tamil Nadu Cinemas (Regulation) Act, ruled that when there is total absence of reasons and not even reference to the reasons recorded by the appellate authority, that disclosed total lack of application of the mind. He further held that the revisional authority should give reasons because the decision is likely to be subject to scrutiny by High Court under Article 226 of the Constitution. In W.P.No.8394 of 1981 and W.P.No.9508 of 1981 dated 8.1.1982 and 21.1.1983 respectively, the learned Single Judge, who dealt with W.P.No. 5633 of 1983, out of which W.A.No.1040 of 1983, now being dealt with, arises ruled that in case of affirmance, when the original Tribunal gives adequate reasons, the Appellate Tribunal may dismiss the appeal agreeing with those reasons. He further held that the purpose of issuing *rule nisi* was to have the file to be produced and that when the file disclosed the reasons that would show that the revisional authority had exercised its power in conformity with law, though the order by itself may not disclose the reasons, and the order would be proper. It is after the review of the above decisions that the Single Judge, who dealt with W.P.No.1954 of 1983 out of which W.A.No. 319 of 1984, now being dealt with arises, came to the conclusion that the preponderance of authorities in this Court was that an order of affirmance by a revisional authority need not be a speaking order.

7. We shall now turn to the rulings of the Supreme Court on the point of issue in the chronological order. In *M.I. Industries v. Union of India*, (1966) 1 S.C.R. 466 : (1966) 1 S.C.J. 204 : A.I.R. 1966 S.C. 671, the Supreme Court, while dealing with a writ petition arising out of an order on revision under rule 55 of the Mineral Concession Rules, held by a majority view (two Judges) that the Central Government was not bound to give in its order full reasons for rejecting the application. One Judge dissenting with that view observed that if tribunals can make orders without giving reasons, it may lead to abuse of power in the hands of unscrupulous or dishonest officers. He further noted that the extent and nature of the reasons depend upon each case and that what was essential was that reasons should be given by an appellate or revisional tribunal expressly or by a reference to those given by the original tribunal.

8. In *Bhagatraja v. Union of India*, (1967) 3

S.C.R. 302 : (1968) 1 S.C.J. 431 : (1968) 1 M.L.J. (S.C.) 77 : (1968) 1 An.W.R. (S.C.) 77 : A.I.R. 1967 S.C. 1606, the Supreme Court, while dealing with an appeal arising out of a revisional order of the Central Government on revision against the order of the State Government under the Mines and Minerals (Regulation and Development) Act, 1957, has decided that a party is entitled to know why the decision has gone against him and further observed as follows:-

"Both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision petition is dismissed curtly. In such a case this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the case. This would certainly be a very unsatisfactory method of dealing with the appeal."

9. In *Som Datt v. Union of India,* (1969) 2 S.C.R. 177 : (1969) 1 S.C.J. 835 : (1969) M.L.J. (Crl.) 447 : A.I.R. 1969 S.C. 414, the Supreme Court held that there was no express obligation imposed in section 164 or by section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial. The Court went further to observe that there was no force in the contention that there was any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision.

10. In the case *Mahabir Prasad v. U.P. State,* (1971) 1 S.C.J. 256 : (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302, while dealing with an order of appeal subject to revision, the Court observed that "unless reasons were given in the order, the aggrieved party had no opportunity to convince the revisional authority that the order was erroneous, that if the aggrieved party was not supplied the reasons the right of appeal was an empty formality and that it must appear that the authority has reached a conclusion which is according to law and just, and for ensuring that it must record the ultimate mental process leading from the dispute to its solution.

11. In the case *Ranganathan v. Daulatrao,* (1975) 1 S.C.C. 696 : (1975) 3 S.C.R. 99 : A.I.R. 1975 S.C.2146, the Supreme Court after observing that when an order is liable to be challenged under Articles 226 and 227 of the Constitution, Courts insist that an appeal ought to be disposed of by a speaking order giving reasons in its support, stated that it might not be possible in all cases to say that a non-speaking order is bad or invalid.

12. In *Siemens Engineering & Mfg. Company of India v. Union of India,* (1976) 2 S.C.C. 981 : (1977) 1 S.C.J. 116 : A.I.R. 1976 S.C. 1785, the Supreme Court has ruled that every quasi-judicial order must be supported by reasons and added that the rule requiring reasons to be given in support of an order was a basic principle of natural justice which must inform every quasi-judicial process and the rule must be observed in its proper spirit and that mere pretence of compliance with it would not satisfy the requirement of law.

13. In the last case cited before us, viz., *Tara Chand v. Delhi Municipality,* (1977) 1 S.C.R. 638 : (1977) Lab.I.C. 55: (1977) 1 S.C.C. 472 : A.I.R. 1977 S.C. 567, the Supreme Court observed as follows:-

"While it may be necessary for a disciplinary or administrative authority exercising quasi-judicial functions to state the reasons in support of its order if it differs from the conclusions arrived at and the recommendations made by the enquiring officer in view of the scheme of a particular enactment or the rules made thereunder, it would be laying down the proposition a little too broadly to say that even an order of concurrence must be supported by reasons. It cannot also be laid down as a general rule that an order is a non-speaking order simply because it is brief and not elaborate. Every case has to be judged in the light of

its own facts and circumstances."

The above review of decisions would disclose that the views of the Courts in this matter have not yet crystallised as to what should be exactly the content of a decision by a revisional authority. The common proposition which appears to energe from the above decisions is that the reasons to be disclosed would depend upon the facts and circumstances of the case.

14. The learned Government Pleader would however persist in his contention that the revisional authority need not set forth the reasons in the order and would place special reliance on a decision of the Supreme Court in *M/s. Sri Raja Lakshmi Dyeing Works and others v. Rangaswamy Chettiar*, (1980) 2 R.C.J. 165 : A.I.R. 1980 S.C. 1253. That decision was in a matter arising under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The provisions of section 25 of the Act provides that the revisional authority has to satisfy itself as to the regularity of the proceedings or correctness or legality or propriety of any decision passed by the subordinate authorities. The provision of section 9 (b) of the Cinemas Regulation Act, providing for revision, is similar to the above said provisions of section 25 of the Act. In that decision, the Supreme Court observed as follows:-

> "The dominant idea conveyed by the incorporation of the words to satisfy 'itself' (emphasis supplied by the Supreme Court), under section 25 appears to be that the power conferred on the High Court under section 25 is essentially a power of superintendence."

Basing on this observation, the learned Government Pleader would contend that the Government exercising revisional power under section 9(b) of the Act, is exercising a power of superintendence and while exercising such a power, the revisional authority need not disclose the reasons for its orders. This contention cannot be accepted, nor the observation of the Supreme Court yields itself to such a stretched view. Under section 9(b) of the Act, a revision by the Government can take place on their own motion or on application. When the matter is taken up by the Government on their own motion, nobody else is interested to know about the decision of affirmance. But, when the revision is effected on the application of an aggrieved party, that party is entitled to know whether the revisional authority satisfied itself and how it satisfied itself.

15. In this connection, it is worth remembering that all decisions by public bodies are vicarious ones. They are taken on behalf of the people by an authority appointed directly or indirectly by the people. So the people have a right of superintendence to satisfy themselves about the acceptability of the decision and for that purpose the reasons leading thereto should be disclosed.

16. Apart from the general public, some individual may specifically be interested in the decision when they are susceptible of affecting their legitimate interest. Before a decision is taken, they are entitled to put forth their point in order to influence the decision to their advantage and when the decision is taken, they are naturally interested to know the reasons of the decision especially if it is not to their expectation.

17. The very fabric of democracy or the Government by the people implies that all decisions of public bodies are transparent, so that the people know fully how, why and what for the decision has been taken. Such a transparency is the best guarantee that the decision has been arrived at after taking into account all the circumstances and after giving due weight to each of these circumstances and also that no external consideration nor oblique motive has been operative in the mind of the authority deciding on behalf of the people. Transparency of decisions has also the advantage of shielding the decision of public bodies against unnecessary suspicion or criticism which otherwise would hand over those decisions and impair their strength.

18. Transparency of the decisions of

legislative bodies is ensured by a public debate at the end of which decisions are taken. Transparency of the decisions of the judiciary is obtained by the public hearing of parties concerned and by a reasoned order. Transparency of the decisions of the executive bodies is achieved by those decisions being open to scrutiny either by the legislature or by the judiciary. In some countries executive decisions also are made directly transparent to the public and to the interested parties by the legal requirements of disclosure of reasons along with the decisions.

19. With these broad principles in mind we shall turn to the circumstances of the case. The impugned order was passed by the government in the exercise of their power of revision, in the discharge of judicial function. Therefore, the norms of judicial process will apply to the order and the reasons have necessarily to be disclosed for the following reasons. Firstly, the interested parties should be convinced that the matter was not disposed of without application of mind and that his case has been considered in its entirety; otherwise the relief provided in law would be illusory. Secondly, the party is interested to know the answer of the authority to his contentions in order to find out whether the matter can be taken to a higher authority if such answers are not found to be satisfactory. Thirdly, the knowledge of reasons is useful and necessary for the party and others who may be in similar circumstances for their future course of action. The losing party may eventually take advantage of principle as per which his case was rejected on a future occasion. This happens for instance very frequently in cases relating to the grant of licences under the Motor Vehicles Act.

20. Apart from the above reasons for which reasons should be disclosed in the interest of the parties concerned, it is also to be stated that clear disclosure of reasons in the order is necessary, since the order is susceptible of being challenged under Article 226 before this Court. If no reasons are disclosed or if they are insufficiently disclosed, this Court would have to go into the whole records and this consumes its time beyond the contemplation of the Constitution, delays the disposal of cases and impairs the over-all efficiency of the system as a whole.

21. Therefore, there cannot be any doubt that in an order passed by the government in a matter, like the present one reasons should be disclosed. But what would be the amount of reasons to be stated would vary from case to case. But this last principle cannot be stretched to the extreme limit so as to say that the absence of reason would indicate that the reasons of the revisional authority in an order of affirmance are the same as those of the appellate authority. Of course, if the revision petitioner does not point out the defects of the appellate authority's order but displays nothing else than obstinacy in merely repeating verbatim the grounds of appeal as grounds of revision, one could consider that the absence of reasons in the confirming order of the revisional authority tantamounts to acceptance of the reasons of the appellate authority. But when the grounds of revision contain specific grounds attacking the reasoning of the appellate Court's order, these grounds have necessarily to be answered. In such a case it cannot be said that the absence of reasons tantamounts to the acceptance of the reasons of the appellate Court even if the order is one of affirmance.

22. The last question to be examined is what is to be done when the order does not contain any reason. Though the order is judicial in nature, it is not processed through in the same manner as in a judicial forum. The Government have got their own method of working, as per which the authority vested with power of decision comes to such a decision upon the perusal of the notes prepared by the Secretariat and the perusal of the records. In such a case, when the order communicated to the party does not by itself contain the reason, it is necessary to ascertain whether the reasons are not to be found in the relevant file. That is why the aggrieved party in such a case would pray the Court to call for the records relating to the decision.

When the records are so called for and when it is found that no reasons are found therein, this Court would be left with no option but to set aside the order, since it has no possibility to assess the merit thereof. If on the contrary there are reasons the Court would see whether the grounds of revision have been properly considered and whether the final decision is in accordance with that consideration. Even if this Court is satisfied that the order is unimpeachable on the basis of the reasons so discovered one has to note that the revision petitioner would have, however, suffered prejudice on account of the absence of reasons in the order itself. Had the reasons been present in the order, he would have got an opportunity to satisfy himself about the reasonableness of the decision. The absence of reasons caused suspicion in his mind and led him to spend money in a writ petition proceedings for calling for the records, he is entitled to the relief for having been placed in such a predicament.

23. Turning now to the orders leading to the present appeals it is found that they read as follows:-

> "The Government have examined the revision application in the reference third cited with the connected records. They consider that there is no ground to interfere with the orders of the Commissioner for Land Administration, Madras, in the reference second cited. They accordingly reject the revision application filed by you."

It is seen that there is total absence of disclosure of reasons in the above order. Records in both the cases have been called for by the Single Judges. They have found that the reasons for the orders are available in the records in the form of elaborate notes and ultimate decision by the Minister. Those reasons have been found acceptable by the Single Judges and the present appeals are filed only on the point whether the orders are bad on account of absence of reasons in the orders. It is clear from the above that the orders are not without reasons and therefore they are not bad. However, the absence of disclosure of the reasons in the order itself has compelled the petitioners to have the records called for and in that process they have incurred an expenditure for which they are entitled to compensation. We, therefore, order that they may be paid each Rs.5,000/-. Barring this relief, the appeals are dismissed.

B.S. .... *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S. Nainar Sundaram, J.*

*W.P.No. 3102 of 1985. *9th July, 1985.*

Rasu Pillai *Petitioner**

v.

The Addl. Tahsildar (Kudiyiruppu), Mayiladuthurai and others *Respondents.*

Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act (XL of 1971), sections 2 (8) (ii) and 3 (2) - 'Kudiyiruppu' and Tenant - Scope - Reference only to site and not superstructure on it occupied by an agriculturist or agricultural labourer either as a tenant or as a licensee.

A reading of section 2 (8) of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act which defines kudiyiruppu leaves no room for doubt that kudiyiruppu could have reference only to the site. Such a site must have been occupied by an agriculturist or agricultural labourer, either as a tenant or as a licensee. There ought to be a dwelling house or a hut over the site. The dwelling house or hut could belong either to the occupant or to any person other than such occupant - may be the owner of the site also. The site will take in not only the exact area over which the dwelling house or hut has

been put up, but also such other area adjacent to the dwelling house or hut **as may be necessary** for the convenient enjoyment of such dwelling house or hut. *[Para. 3]*

The very object of the Act is to provide for the conferment of ownership rights on the occupants of kudiyiruppu in the State of Tamil Nadu, as its very preamble would indicate. Its object is not to cover and take in demise of premises, consisting of site and superstructure as a single unit, either on lease or licence. The demise by way of lease or licence ought to have been of the site alone. *[Para. 3]*

Where an agriculturist or an agricultural labourer was in occupation of a site on a lease or a licence, express or implied, such a site could fall within the meaning of kudiyiruppu. If the demise is both of the site and the superstructure as a single unit, the matter could not be brought within the purview of the Act. Section 8 (2) of the Act has got a purpose to serve, *viz.*, where the superstructure belongs to any person other than the occupant as per the terms of that section such superstructure shall also vest in the occupant. But that purpose cannot be extended to say that even though the demise in favour of the occupant was not only of the site but also of the superstructure as a single unit, the provisions of the Act would be attracted and the occupant could claim the rights conferred by the Act. *[Para. 4]*

Cases referred to:-

K.Visalakshi v. Maruthamuthu Pillai, (1981) 94 L.W. 514; *T.K.Narayana Pillai v. Naganatha Iyer*, (1981) 94 L.W. 253 : (1981) 1 M.L.J. 506 : A.I.R. 1981 Mad. 196: *Manickam v. Dharmapuram Adheenam*, (1984) 2 M.L.J. 148.

D.C.Krishnamurthy, for Petitioner.

D.I.J. Rajkumar, Govt. Advocate and *B.Kumar*, for Respondents.

The Court made the following

ORDER:- The petitioner in this writ petition claims that he was an occupant of a kudiyiruppu within the meaning of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971 (Act XL of 1971), hereinafter referred to as the Act. On 19th June, 1971 he applied for the kudiyiruppu patta, seeking determination of the question as to whether he was in such occupation or not. According to the petitioner, he is an agriculturist cultivating nanja lands of about 4.13 acres belonging to the 4th respondent as a tenant and further he is occupying a site measuring 7 cents in S.No.108 in Mannampanthal vattam, Mayiladuthurai taluk, and the superstructures put up thereon, both belonging to the 4th respondent. The petitioner would characterise his occupation of this site of an extent of 7 cents as occupation of a kudiyiruppu within the meaning of the Act. The 4th respondent contested the case of the petitioner, stating *inter alia* that the demise was not only of this site of 7 cents but also of the superstructures put up thereon as a single unit, under a tenancy arrangement while the petitioner served the 4th respondent as a car driver, and since the petitioner has been removed from service, he could not continue to be in occupation of the premises and in any event, there could not be a claim for kudiyiruppu under the Act by the petitioner. The 4th respondent also raised a controversy over the claim of tenancy put forth by the petitioner with regard to the nanja lands of about 4.13 acres, with which we are not very much concerned in these proceedings in view of the point raised. The first respondent heard the matter, opined that the site and the superstructures belonging to the 4th respondent would not be an impediment with regard to countenancing the claim of the petitioner for kudiyiruppu patta and following a pronouncement of Sethuraman, J., in *K.Visalakshi v. Maruthamuthu Pillai*, (1981) 94 L.W. 514, granted the petitioner the kudiyiruppu patta in respect of the 7 cents of site along with the superstructure thereon since as per the provisions of section 3 (2) of the Act, the superstructure shall also vest in the occupant of the kudiyiruppu. The 4th respondent appealed and the appeal came to be heard and disposed of by the 2nd

respondent and by the order impugned in the writ petition, the second respondent reversed the order of the first respondent holding that the demise was not only of the site but also of the superstructure and hence the provisions of the Act could not be invoked. The second respondent chose to follow the pronouncement of Suryamurthy, J., in *T.K.Narayana Pillai v. Naganatha Iyer*, (1981) 94 L.W. 253 : (1981) 1 M.L.J. 506 : A.I.R. 1981 Mad. 196. The order of the second respondent is being put in issue in this writ petition.

2. There is a controversy as to whether the petitioner is an agriculturist within the meaning of the Act. The petitioner claims himself to be an agriculturist. This is not being accepted by the 4th respondent. It has come out from the materials placed in the case that while the petitioner was serving the 4th respondent as a driver, he was inducted into possession of the premises--both the site and superstructure--and his services have been terminated subsequently and further, he was also given a lease of nanja lands of an extent of 4.13 acres. The first respondent proceeded that the petitioner is an agriculturist within the meaning of the Act, on the ground that he must be cultivating this extent of nanja lands. However, in the order passed by the second respondent, I do not get indication of any positive adjudication on this' question. On behalf of the 4th respondent, it is contended before me that even assuming that the petitioner is an agriculturist, yet, the demise by way of a lease in favour of the petitioner being not only of the site of an extent of 7 cents, but also of the superstructure thereon as a single unit, both belonging to the 4th respondent, the provisions of the Act could not at all be invoked, and, the subject-matter of demise and the occupation by the petitioner was not of a kudiyiruppu within the meaning of the Act. Learned Counsel for the petitioner does not dispute before me that the demise in favour of the petitioner by way of lease was not only of the site but also of the superstructure standing thereon as a single unit. What he would contend is that by virtue of section 3(2) of the Act, even though the superstructure belongs to the 4th respondent, it would come to vest in the petitioner and the occupation of the petitioner would still be characterised as kudiyiruppu within the meaning of the Act and hence the rights under the Act could be claimed and granted. Learned Counsel for the petitioner places reliance on the pronouncement of Sethuraman, J., referred to above. As against this Mr. B.Kumar, learned Counsel for the 4th respondent, would submit that the very definition 'kudiyiruppu' in section 2 (8) of the Act speaks about the site of any dwelling house or hut occupied, either as tenant or as licensee, by any agriculturist or agricultural labourer and furthermore, the definition of 'tenant' under section 2 (11) of the Act contemplates tenancy of the site alone and hence only if the demise is of the site alone and not of the site and the superstructure as a single unit, the ouccpant of such a site could claim kudiyiruppu rights and the definition of 'kudiyiruppu' under the Act does not and cannot take in the demise on lease of a premises consisting of site and superstructure as a single unit.

3. Before I assess the contentions put forth by the respective Counsel, I would like to advert to the relevant provisions of the Act. Section 2 (8) defines 'kudiyiruppu' as follows:-

> "Kudiyiruppu means the site of any dwelling house or hut occupied either as tenant or as licensee, by any agriculturist or agricultural labourer and includes such other area adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut.
>
> Explanation......"

Section 2 (11) defines 'tenant' in the following terms:

> 'Tenant' means any person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter under a tenancy agreement, express or implied, and includes his heirs and legal representatives."

Section 3 reads as follows:-

> "*Occupant of kudiyiruppu to become owner:-* (1) Any agriculturist or agricultural labourer who was occupying any kudiyiruppu on the 19th June, 1971, either as tenant or as licensee shall, with effect from the date of the commencement of this Act, be the owner of such kudiyiruppu, and such kudiyiruppu shall vest in him absolutely free from all encumbrances.
>
> (2) Where, in the case of occupant of kudiyiruppu referred to in sub-section (1), the superstructure belongs to any person other than such occupant, such superstructure shall also, with effect from the date of the commencement of this Act, vest in such occupant absolutely free from all encumbrances."

A bare reading of section 2 (8) which defines kudiyiruppu leaves no room for doubt in the mind of the Court that 'kudiyiruppu' could have reference only to the site. Such a site must have been occupied by an agriculturist or agricultural labourer, either as a tenant or as a licensee. There ought to be a dwelling house or a hut over the site. The dwelling house or hut could belong either to the occupant or to any person other than such occupant--may be the owner of the site also. The site will take in not only the exact area over which the dwelling house or hut has been put up, but also such other area adjacent to the dwelling house or hut as may be necessary for the convenient enjoyment of such dwelling house or hut. For the purpose of understanding the definition of kudiyiruppu under section 2 (8), it is proper to advert to and keep in mind the definition of 'tenant' occurring in section 2(11) of the Act, which speaks about only a tenancy of the land. The very object of the Act is to provide for the conferment of ownership rights on the occupants of kudiyiruppu in the State of Tamil Nadu, as its very preamble would indicate. Its object is not to cover and take in demise of premises, consisting of site and superstructure as a single unit, either on lease or licence. The demise by way of lease or licence ought to have been of the site alone.

4. In *T.K.Narayana Pillai v. Naganatha Iyer*, (1981) 94 L.W. 253 : (1981) 1 M.L.J. 506: A.I.R. 1981 Mad. 196, Suryamurthy, J., had to deal with this question squarely and the observations of the learned Judge run as follows:-

> "The question to be considered is whether sub-section (2) of section 3 will avail the defendant in the instant case. Sub-section (2) of section 3 will be applicable only if the defendant proves that he is an occupant of a kudiyiruppu and as 'kudiyiruppu' means the site of any dwelling house or hut, occupied by him, either as tenant or licensee, he should have taken the site alone on lease, if he is to claim the benefits of the Act. Any other interpretation of the definition of kudiyiruppu in sub-section (8) of section 2 of the Act will have far-reaching and calamitous consequences, because every agriculturist who is in occupation of a house as a tenant within the area to which the Act applies can then claim the benefits of the Act, not only in respect of the site but also of the house."

This ratio of the learned Judge has been followed by Mohan, J., in *Manickam v. Dharmapuram Adheenam*, (1984) 2 M.L.J. 148. No exception could be taken to the ratio enunciated by the learned Judges of this Court who had occasion to deal with the question directly. On my own assessment also of the provisions of the Act, I have to hold that only where an agriculturist or an agricultural labourer was in occupation of a site on a lease or a licence, express or implied, such a site could fall within the meaning of kudiyiruppu. If the demise is both of the site and the superstructure as a single unit, the matter could not be brought within the purview of the Act. Section 3 (2) of the Act has got a purpose to serve, *viz.*, where the superstructure belongs to any person other than the occupant of a kudiyiruppu, such superstructure shall also vest in the occupant as per the terms of that section. But, that purpose cannot be extended to say that even though the demise in favour of the occupant was not only of the site,

unit, the provisions of the Act would be attracted and the occupant could claim the rights conferred by the Act. In the decision relied on by the learned Counsel for the petitioner, Sethuraman, J., had no occasion to consider the question directly, because this question never arose before the learned Judge in the manner in which it has arisen before me and the other two learned Judges of this Court. In the case dealt with by Sethuraman, J., the lower appellate Court, in a civil litigation, declined to countenance the case of a person, defendant in the suit, that he is entitled to the benefits of the Act, on the ground that where the site as well as the superstructure belong to the owner, the occupant could not become entitled to the benefits of the Act. The facts of the case, the contentions of the parties and the point dealt with by the learned Judge are totally different. This is quite evident from the relevant passage occurring in the judgment of Sethuraman, J., which passage stands extracted as follows:-

'The lower appellate Court took three possible cases that may arise for the application of this provision. In the first category of cases falls a case where the site belongs to a particular person and the agriculturist has put up a superstructure. The second category comprises a case where a site belongs to a particular person and the superstructure belongs to a third party and the agriculturist is in occupation of the property. The lower appellate Court is of the view that to these two categories of cases, the provisions of the Act would clearly apply. This view is correct. The third category of cases mentioned by the lower appellate Court is where the site as well as the superstructure belongs to the owner. In such a case, according to the lower Appellate Court, the occupant does not become the owner. For the purpose, reliance is placed on the following words in sub-section (2) of section 3, *viz.*, the superstructure belongs to any person other than such occupant'. It is not clear how the Court understands the above words to mean that the superstructure must belong to a third party and not the owner of the site itself. So long as the occupant is not the owner of the superstructure, sub-section (2) of section 3 would apply. The words 'the superstructure belongs to any person other than such occupants' would include all those cases where the occupant is not the owner but some one else is, whether he is the owner of the site or a third party. The provision is so clear in its language that it is rather surprising that the lower appellate Court came to the conclusion that sub-section (2) of section 3 does not apply to a case where the superstructure and the site belong to the same owner. In this case, there is no dispute that the defendant was an agriculturist. On this construction of the provision it would follow that the defendant was entitled to rely on section 3 (2) of the Act read with section 2 (8).'

The first authority, *viz.*, the first respondent, was not in order in placing reliance on the judgment of Sethuraman, J., on the facts of the case to uphold the claims of the petitioner and the appellate authority, *viz.*, the second respondent, in my view, did the right thing in following the pronouncement of Suryamurthy, J.

5. In the circumstances stated above, I could not uphold the grievance of the petitioner that there was any error committed by the second respondent by passing the impugned order. Accordingly, this writ petition fails and the same is dismissed. There will be no order as to costs.

B.S. .... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *G.Ramanujam and M.A.Sathar Sayeed, JJ.*

*Writ Appeal Nos. 233, 248 to 250/78 against W.P.Nos.197 and 417 of 1978.

4th February, 1985.

D. Jayaraman and others *Appellants**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Industries Department, Madras-9 and others *Respondents*

Tamil Nadu Handloom and Textiles Service Special Rules, rule 10 made under G.O.Ms. No.1140 (Industries) dated 9.8.1975 - Scope and applicability - Said rules made in 1970 given retrospective effect from 30.4.1971.

Under the *ad hoc* rules in G.O.Ms.No. 1061 (Ind.), Department of Industries etc., dated 20.4.1966 for the post of Textile Control Officers, respondents 3 to 16 were appointed as such officers for special reasons though they were outside the *ad hoc* rules. Writ petitions challenging the appointments were allowed by a single Judge who quashed the appointments and directed the authorities to consider recruitment to the posts in accordance with the rules. The petitioners in the writ petitions were so appointed. The respondents filed writ appeals against the single Judge's order. Subsequently, the Special Rules for Tamil Nadu Handloom and Textiles Service Rules were made under G.O.Ms.No.1140 (Ind.) dated 9.8.1970 and given retrospective effect from 30.4.1971 in the place of the *ad hoc* rules. The respondents were therefor promoted as Textile Control Officers. As to the effect of the single Judge's order under these circumstances,

Held:- Special Rules have been framed for the personnel working in the Tamil Nadu Handloom and Textile Service called the Special Rules for Tamil Nadu Handloom and Textile Service made under G.O.Ms. No.1140. (Industries) dated 9th August, 1979. The said rules made in 1970 have been given retrospective effect from 30th April, 1971. As per the said Special Rules, the Textile Control Officers have to be appointed by recruitment by transfer from among Tahsildars in the Tamil Nadu Revenue Subordinate Service and Government Superintendent/Superintendents working in the Department of Handloom and Textiles. Thus all the Superintendents working in the Handlooms and Textile Department are now entitled to be appointed as Textile Control Officers unlike the earlier *ad hoc* rules which provided for the appointment of Textile Control Officers only from the category of Tahsildars and Superintendents who are governed by Tamil Nadu Ministerial Service. The saving clause contained in rule 10 says that nothing contained in those rules shall adversely affect any person holding the posts on the date of issue of the rules. On coming into force of the said rules, respondents 3 to 16 have, in fact, been promoted as Textile Control Officers. Thus, the petitioners in the writ petitions as well as respondents 3 to 16 in the writ petitions have all been promoted. The promotion of the petitioners in the writ petitions in pursuance of the orders passed by the single Judge, before the issuance of the Special Rules is covered by the Saving Clause contained in rule 10 of the Special Rules. The appointment of respondents 3 to 16 made in pursuance of the Special Rules will be taken to have effect from 30th April, 1971, in view of the retrospective effect given to the provisions of the Special Rules. Thus, the appointment of the petitioners in the writ petitions as well as the subsequent promotion of respondents 3 to 16 are all effective. [Para. 2]

Appeals under clause 15 of the Letters Patent against the order of Mr. Justice Mohan, dated 3.3.78 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos.197, 147 of 1975 presented under Article 226 of the Constitution of India to issue writ of *mandamus*, after setting aside the promotion of respondents 3 to 16 as Textile Control Officers directing the 2nd respondent to promote the petitioner as Textile Control Officer with effect

from the date of promotion of the 3rd respondent viz., 24.2.1973.

S. Ramalingam, for *Selvarathinam*, for Appellants.

K.Sridhar, for Government Pleader and *P. Chidambaram*, for Respondents.

The Judgment of the Court was delivered by

RAMANUJAM, J.:- Since all these writ appeals raise the same issue, they are dealt with together. These writ appeals arise out of the order of Mohan, J., in two writ petitions, W.P.Nos. 197 and 417 of 1975. The appellants are aggrieved against the common order of the learned single Judge. The circumstances under which the writ petitions came to be filed before this Court may briefly be noted. There was recruitment of Lower Division Clerks in the Office of the Director of Handloom and Textiles, Madras, through the Tamil Nadu Public Service Commission and the petitioners in the said writ petitions were persons who were selected for appointment as Lower Division Clerks through the Tamil Nadu Public Service Commission. The posts of Lower Division Clerk and Upper Division Clerk as also the Superintendent in the Director of Handlooms and Textiles were governed by the rules applicable to the Madras Ministerial Services. The petitioners who were recruited as Lower Division Clerks were later promoted as Upper Division Clerks or Assistants. After completion of the probation, they were regularly promoted as Superintendents. They were also declared to have satisfactorily completed their probation later. In the meanwhile, a separate wing in the Co-operative Department to look after the Handloom Weavers' Co-operative Society was formed. These officers occupied the posts of Junior Inspector, Senior Inspector or Co-operative Sub-Registrar, as the case may be, in the Co-operative Department. They were governed by the rules applicable to the Madras Co-operative Subordinate Service. In the year 1960, the personnel looking after the handloom work in the Co-operative Department were brought under the administrative control of the Director of Handlooms and Textiles. They further continued to be designated as Junior Inspector, Senior Inspector and Co-operative Sub-Registrar and they also continued to be governed by the rules applicable to Madras Co-operative Subordinate Services and their promotions and other matters affecting their service were made by the Registrar of Co-operative Societies. Thus, there were two sets of personnel, one governed by the Madras Co-operative Subordinate Service Rules and the other the Madras Ministerial Service Rules. However, the Government in G.O.Ms.No.2156 (Ind.) Department of Industries, Labour and Co-operation dated 15.4. 1961 framed *ad hoc* rules under the proviso to Article 309 of the Constitution for all the personnel working in the Office of the Director of Handlooms and Textiles, Madras. By reason of those rules, the appointment to the post of Superintendents are to be made by recruitment by transfer from among the Senior Inspectors or from promotion among the Upper Division Clerks working in the Office of the Director of Handlooms. In the Department of Handlooms and Textiles, the higher post to that of the Superintendent was Textile, Control Officer in the scale of Rs.525-25-600-30-750. In G.O.Ms.No.2326 (Ind.) Department of Industries Labour and Co-operation, dated 29.4.1965, *ad hoc* rules under Article 309 of the Constitution were made for the post of Senior Superintendents. Rule 4 of the said *ad hoc* rules provided recruitment being made to the post of the Textile Control Officer as well as the Superintendent being filled up by transfer from the following categories:

(i) By transfer from the post of Tahsildars; or

(ii) by recruitment by transfer from the categories of Selection Grade Superintendents or Superintendents. Working in the Office of the Director of Handlooms who have put in not less than 2 years of service as such.

Though the personnel working in the Director of Handlooms and Textiles, Madras, came from two sources, the personnel coming from the Co-operative

Department were not shown as a category for being recruited by transfer to the post of either Textile Control Officer of the Senior Superintendent. Under G.O.Ms.No.1961 (Ind.) Department of Industries, Labour and Housing dated 20.4.1966, *ad hoc* rules were framed for recruitment to the post of Textile Control Officers and that also provided for transfer from Tahsildar as well as Superintendent in the Director of Handlooms and Textiles Department. Though the said *ad hoc* rules did not provide for the personnel who come from the Co-operative Department and who are working as either Inspectors or Co-operative Sub-Registrars in the Office of the Director of Handlooms, respondents 3 and 4 were promoted as Textile Control Officers taking into account the representations made by the personnel coming from the Handloom Department and also on the basis of the recommendations made by the Director of Handlooms. The said appointment of respondents 3 to 16 as Textile Control Officers were challenged before this Court in W.P.Nos. 197 and 417 of 1975. Mohan, J., allowed those writ petitions holding that relevant *ad hoc* rules which were in operation at the relevant time did not provide for the personnel coming from the Co-operative Department being promoted and that at the relevant time only persons in the category of Tahsildar and Superintendent in the Director of Handlooms and Textiles alone would be considered for promotion to the post of Textile Control Officers and so long as that *ad hoc* rules are not amended, it is not open to the State Government or the Director of Handlooms to effect recruitment in violation of the said *ad hoc* rules. In that view, the learned single Judge quashed the appointments and also directed the authorities to consider the question of recruitment to the post of Textile Control Officers strictly in accordance with the *ad hoc* rules then in force.

2. It appears that in pursuance of the orders passed by Mohan, J., the petitioners in the writ petitions were actually promoted as Textile Control Officers. Respondents 3 to 16 aggrieved against the order of Mohan, J., had filed the writ appeals questioning the order of Mohan, J. After the filing of the appeals in the place of *ad hoc* rules, special rules have been framed for the personnel working in the Tamil Nadu Handloom and Textile Service. Those rules are called the Special Rules for Tamil Nadu Handloom and Textiles Service made under G.O.Ms.No. 1140, (Industries), dated 9th August, 1979. The said rules made in 1979 have been given retrospective effect from 30th April, 1971. As per the said Special Rules, the Textile Control Officers have to be appointed by recruitment by transfer from among the Tahsildars in the Tamil Nadu Revenue Subordinate Service and Grade Superintendent/Superintendents working in the Department of Handlooms and Textiles. Thus, all the Superintendents working in the Handlooms and Textiles Department are now entitled to be appointed as Textile Control Officers unlike the earlier *ad hoc* rules which provided for the appointment of Textile Control Officers only from the category of Tahsildars and Superintendents who are governed by the Tamil Nadu Ministerial Service. The saving clause contained in rule 10 says that nothing contained in those rules shall adversely affect any person holding the posts on the date of issue of the rules. On coming into force of the said Special Rules, respondents 3 to 16 have, in fact, been promoted as Textile Control Officers. Thus, the petitioners in the writ petitions as well as respondents 3 to 16 in the writ petitions have all been promoted. The promotion of petitioners in the writ petitions in pursuance of the orders passed by Mohan, J., before the issuance of the Special Rules is covered by the saving clause contained in rule 10 of the Special Rules. The appointment of respondents 3 to 16 made in pursuance of the Special Rules will be taken to have effect from 30th April, 1971 in view of the retrospective effect given to the provisions of the Special Rules. Thus, the appointment of the petitioners in the writ petitions as well as subsequent promotion of respondents 3 to 16 are all effective. Neither the petitioners nor respondents 3 to 16 in the writ petitions are now prejudiced in any manner. However, it is seen that the order passed by the learned single Judge consists of two parts, the first

part quashing the order of appointment of respondents 3 to 16 to the post of Textile Control Officers and the second part consisting of a direction to the authorities to consider the case of the writ petitions for appointment to the post of Textile Control Officers. On the basis of the direction, the respondents have considered the claims of the writ petitioners for promotion and have actually granted them the promotion as Textile Control Officers which stands validated by the saving clause contained in rule 10 of the Special Rules. The second part of the order of the learned single Judge cannot be interfered with. However, in view of the fact that after the Special Rules have been framed giving retrospective effect, respondents 3 to 16 have been promoted with retrospective effect from 30th April, 1971, the order of the learned single Judge quashing the appointment orders of respondents 3 to 16 has to be set aside. In view of the subsequent development referred to above the impugned appointments have since been validated.

3. The writ appeals are allowed to the extent indicated above. There will be no order as to costs.

R.S. ...... *Writ Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Present:- *S. Mohan, J.*

*W.P.No. 9423 of 1982.

4th September, 1985.

Annai Indira Labour Contract Co-operative Society, Tirusoolam Village, represented by its Chief Promotor T.J.Lakshmanan, Tirusoolam, Madras-600 100 *Petitioner**

v.

The Deputy Registrar, Co-operative Societies, Saidapet, Madras-600 015 and another *Respondents*

(A) Tamil Nadu Co-operative Societies Act (53 of 1961), section 9 (1) - Request for registration by petitioner - Rejection of request by Deputy Registrar - Matter within the parameters indicated in the section.

(B) Tamil Nadu Co-operative Societies Act (53 of 1961), section 96 - Appeal against the order of Deputy Registrar provided - No justification to bye-pass that remedy - Writ petition to the High Court - Petitioner directed to file appeal.

(C) Constitution of India (1950), Article 226 - Alternative remedy available - Writ petition to the High Court dismissed with direction to file an appeal.

Held:- No doubt registration of a society can be granted by the Registrar, in this case by the Deputy Registrar if it is in accordance with the provisions of the Co-operative Societies Act and the rules or the Co-operative principles. But the most important point is, what is contained in the later half of section 9 (1) of the Act. That says that the Registrar should satisfy himself that the society will, in his own opinion, work successfully. That is the essential law, however avowedly placed it within the subjective realm. Where, therefor the attention of the Deputy Registrar has been drawn to the law and order problem, which in his opinion, having regard to the past experience will render this society functioning unsuccessfully, it has to be held that it perfectly falls within the parameters indicated by sub-section (1) of section 9 of the Tamil Nadu Co-operative Societies Act, 1961. *[Para. 3]*

Besides this an appeal is provided against the impugned order under section 96 of the Tamil Nadu Co-operative Societies Act, 1961 to the Registrar. Therefore there is no justification for the petitioner to bye-pass that remedy. The petitioner is directed to file an appeal. *[Para. 4]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified*

mandamus calling for the records of the first respondent in Na.Ka.No.4227/82 dated 25.10.82 and quash the same and direct the respondent to register the society as applied for by the petitioner on 25.3.82 in accordance with the provisions of the Co-operative Societies Act.

S. Ramalingam, for *K.Govindarajan* and *V. Venkataswami*, for Petitioner.

N.R. Chandran, Additional Govt. Pleader (Writs) and *G.Rajan*, for Respondents.

The Court made the following

ORDER:- In this writ petition, the petitioner has prayed for a writ of *certiorarified mandamus* directing the first respondent herein to register the society as applied for by the petitioner on 25.3.1982 in accordance with the provisions of the Tamil Nadu Co-operative Societies Act, 1961.

2. Mr. S.Ramalingam, learned Counsel for the petitioner, urges that the rejection of the request of the petitioner for registration is arbitrary in that, having directed the petitioner to comply with the necessary formalities, to go back and reject the request of the petitioner would amount to arbitrariness. Therefore, the impugned order is liable to be quashed. Further, the rejection is not warranted under section 9 of the Tamil Nadu Co-operative Societies Act, 1961. The learned Additional Government Pleader says that the impugned order dated 25.10.1982 of the first respondent is self-explanatory. The rejection in this case is mainly on the ground of law and order problem, which, certainly is a valid ground under section 9 of the Tamil Nadu Co-operative Societies Act, 1961. Mr. G.Rajan, appearing for the party impleaded, supporting the learned Additional Government Pleader, submitted that having regard to the past experience when situation became worse in that, there was a breach of peace, the impugned order is fully supportable. Undoubtedly, it is within the scope of section 9 of the Act.

3. I have very carefully perused the impugned order dated 25.10.1982 rejecting the request for registration of the petitioner-society. It mainly proceeds on the ground that the attention of the Deputy Registrar of Co-operative Societies has been drawn to the fact that there would be law and order problem in case two societies function. This Court cannot, like under section 145, Criminal Procedure Code proceedings, go into the question whether this statement is correct or not. Certainly, the poor labourers cannot be exposed to the risk of life or limb or even required to face such hazards, more so in a place where mining operations go on with explosives as well. As to the scope of section 9 of the Tamil Nadu Co-operative Societies Act, 1961, I may now extract sub-section (1) of section 9 which reads as follows:-

> "If the Registrar is satisfied that the application for the registration of a society is in accordance with the provisions of this Act and the rules and that the proposed bye-laws are not contrary to this Act or the rules or to co-operative principles and that the society will, in his opinion, work successfully he may register the society and its bye-laws."

No doubt, registration can be granted by the Registrar, in this case by the Deputy Registrar, if it is in accordance with the provisions of the Act and the rules and the proposed bye-laws are not contrary to this Act or the rules or the co-operative principles. But the most important point to be noted is, what is contained in the later half of the sub-section. That says that the Registrar should satisfy that the society will, in his opinion, work successfully. Therefore, that is the essential law, however, avowedly placed it within the subjective realm. Where, therefore, the attention of the Deputy Registrar has been drawn to the law and order problem, which, in his opinion, having regard to the past experience will render this society functioning unsuccessfully, I should hold that it perfectly falls within the parameters indicated by sub-section (1) of section 9 of the Tamil Nadu Co-operative Societies Act, 1961.

4. Besides this, an appeal is provided

against the impugned order under section 96 of the Tamil Nadu Co-operative Societies Act, 1961, to the Registrar. There is no justification for the petitioner to bye-pass that remedy. Therefore, I hereby direct the petitioner to file an appeal on or before 15.10.1985 and as and when such appeal comes to be filed, due notice will be given to the parties concerned including the party impleaded herein, namely, Tirusoolam Anna Harijan Blue Metal Workers' Industrial Co-operative Society and the appellate authority will consider the case from the angle of law and order as is prevalent to-day. If necessary, he may even get reports from the concerned police authorities. However, should he be inclined to accord registration, such registration shall date back to the date of the application of the petitioner. With these observations, the writ petition is dismissed. There will be no order as to costs.

R.S. .... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *V.Ramaswami and David Annousamy, JJ.*

*W.A.No. 96 of 1981. *14th September, 1984.*

G. Annamalai Pillai *Appellant**

v.

The Dist. Revenue Officer, Coimbatore and others *Respondents*

Hindu Minority and Guardianship Act (XXXII of 1956), section 8 - Lease deed executed by the father of a minor in contravention of the Act - Avoidance of the lease by the minor on obtaining majority - Avoidance effective from the date of the transaction.

Where the father of a minor leased out the minor's property for a term extending more than one year beyond the date on which the minor would attain majority, the lease is hit by section 8 (2) (b) of the Hindu Minority and Guardianship Act. When the minor avoided the lease executed by his father, the lease became void from its inception and no statutory rights could, therefore, accrue in favour of the lessee. *[Para. 10]*

Cases referred to:-

Chandrasekaran v. Kunju Vanniar, (1976) 2 M.L.J. 243 : 88 L.W. 216 : A.I.R. 1975 Mad. 227; *G. Ponniah Thevar v. Nallayam Perumal Pillai*, (1977) 1 S.C.J. 458 : (1977) 2 M.L.J.(S.C.) 1 : (1977) 1 An.W.R.(S.C.) 1 : (1977) 1 S.C.C. 500 : (1977) 2 S.C.R. 446 : A.I.R. 1977 S.C. 244; *Satgur Prasad v. Harnarain Das*, L.R. (1932) 59 I.A. 147 : 62 M.L.J. 451 : 35 L.W. 667 : A.I.R. 1932 P.C. 89; *S.N.R. Sundara Rao and Sons v. Commissioner of Income-tax, Madras*, (1957) 31 I.T.R. 449 : A.I.R. 1957 Mad. 451.

K.V. Sankaran, for *A.V.Ilango, P.Rathinam* and *T.M.Vasudevan*, for Appellant.

M.A. Sadanand, Govt. Advocate and *Mrs. Radha Gopalan*, for Respondents.

The Order of the Court was made by

RAMASWAMI, J.:- Under a registered deed dated 27th December, 1971 the fourth respondent, father of the 5th respondent, executed a lease deed for a period of five years in respect of his minor son 5th respondent's separate property in favour of the appellant herein. On the date when the lease deed was executed, the fifth respondent was a minor, his date of birth being 27.9.57. Claiming to be a cultivating tenant, by virtue of the lease deed executed by the 4th respondent, the appellant filed an application before the Tahsildar, the 3rd respondent under the provisions of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (Act 10 of 1969) praying to register him as a tenant in the tenancy records as per the provisions of the Act. The 5th respondent contested the said proceeding on the ground that the lands are his properties, that his father had no manner of right or title to deal with the same and lease the property contrary

to the provisions of section 8 of the Hindu Minority and Guardianship Act (XXXII of 1956), that he had no knowledge of the same, that he avoided the lease executed by his father on 15.9.1958 and that therefore, the appellant could not claim any right under the Act. Though there was some dispute as to whether the land belonged to the 5th respondent or not, all the authorities have held that it belonged to the 5th respondent and there is no dispute about the same in this appeal. On the question whether there was any valid tenancy, the 3rd respondent Tahsildar, held that in view of section 8 (2) (b) of the Hindu Minority and Guardianship Act and the lease having been avoided by the minor after the he attained the age of majority, there was no valid lease and the appellant could not claim the status of a cultivating tenant and accordingly he dismissed the petition.

2. On appeal, the Revenue Divisional Officer, Tirukoilur, the second respondent herein, however, held that the appellant was a contractual tenant and that therefore he is entitled to be registered as a cultivating tenant.

3. The 5th respondent preferred a revision to the first respondent, the District Revenue Officer, South Arcot at Cuddalore, who set aside the order of the Appellate Authority, and restored the order of the Tahsildar, holding that the appellant is not a cultivating tenant. The writ petition filed by the appellant was dismissed. Hence the present appeal against the order in W.P.No.3143 of 1978.

4. The learned Counsel for the appellant contended that on 27th December, 1971, when the lease deed was executed and he was given possession of the land by the father of the minor, there was a valid and enforceable lease and even if the 5th defendant had any right for avoiding the sale after he attained the age of majority, the lease being initially valid, he is entitled to the benefits of a cultivating tenant. In support of this contention he relied on two decisions, one Full Bench of this Court in *Chandrasekaran v. Kunju Vanniar and others*, (1976) 2 M.L.J. 243 : 88 L.W. 216 : A.I.R. 1975 Mad. 227 and another by the Supreme Court in *G. Ponniah Thevar v. Nallayam Perumal Pillai and others*, (1977) 1 S.C.C. 500 : (1977) 1 S.C.J. 458 : (1977) 2 An.W.R. (S.C.) 1 : (1977) 2 M.L.J. (S.C.) 1 : (1977) 2 S.C.R. 446 : A.I.R. 1977 S.C. 244. In the Supreme Court case, a lease deed was executed by a life estate holder. On the cessation of the life estate the successor claimed that the lease executed was not binding on him and that so far as he is concerned, the tenant could not claim the benefits of the Cultivating Tenants Protection Act. The Supreme Court held that the life estate holder is entitled to create a tenancy and by virtue of the provisions of the Act, such a tenant created by her could legally extend beyond her life time and bind the successor. The ratio of the Supreme Court judgment thus is that there could be no doubt that a life estate holder is entitled to lease the property in her own right. He does not deal with it, as the property of the successor. Though the lease itself may be valid only during the life-time of the life estate holder, the authority to lease could not be questioned. If once initially there was a valid tenancy, by reason of succession the rights of the tenant under the statute is not taken away. It may also be mentioned that the statutory definition of 'landlord' relates not only to the person who created the lease, but contemplates and takes in every successive holder, who has the right at the time of filing the suit, to realise rents or evict persons in wrongful occupation. It is in these circumstances, the Supreme Court held that there is nothing in the Act to show that the protection given to the cultivating tenant was given only against his original lessor and did not extend to subsequent holders of land occupying the capacity of the landlord.

5. The decision reported in *Chandrasekaran v. Kunju Vanniar and others*, (1976) 2 M.L.J. 243 : 88 L.W. 216 : A.I.R. 1975 Mad. 227, related to a lease by a usufructuary mortgagee. The question that was referred to the Full Bench was whether the tenants under the usufructuary mortgage are entitled, after the redemption

of the usufructuary mortgage, to claim the protection granted under the Tamil Nadu Cultivating Tenants Protection Act, 1955, as against the mortgagor. The Full Bench held that since the tenancy originated in an agreement, though because of the redemption such an agreement came to an end, the tenant continued to be in possession and he will be entitled to the benefits of the Act as a cultivating tenant. It will not be a case of a usufructuary mortgagee conferring upon the tenant a higher title than what he is possessed of. It is only the statute that gave the right to the tenant even after the cessation of the tenancy agreement. It may also be seen from this decision that the usufructuary mortgagee was entitled to lease the property, though that may enure for the benefit of the tenant only during the period when the mortgage was subsisting. However, in view of the special definitions and the rights conferred under the statute, the tenant gets the statutory right as a cultivating tenant.

6. Section 8(2) of the Hindu Minority and Guardianship Act, 1956, provides that the natural guardian shall not, without the previous permission of the Court, lease any part of the minor's property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. In this case, though the lease deed was for a term not exceeding five years, it is hit by the other provision *viz.*, 'for a term extending more than one year beyond the date on which the minor will attain majority'. We have already noticed that the fifth respondent minor was born on 27th September, 1975 and, therefore, he would have attained age of majority on 27th September, 1975. Since the lease deed was upto 29th December, 1976, it is hit by the provisions of section 8 (2) (b) of the Act. After prohibiting a lease of that type, clause (3) of section 8 stated that any disposal of immovable property by a natural guardian, in contravention of sub-section (2), is avoidable at the instance of the minor or any person claiming under him. In exercise of this power of avoidance, the minor, as already stated, on 15th September, 1978 has terminated the lease and avoided the transaction.

7. The short question, therefore, for our consideration is whether the avoidance of the lease deed is effective from the date of the transaction itself, so as to make the transaction void and unenforceable from the inception, so that the principles enunciated in *G. Ponniah Thevar v. Nellaya Perumal Pillai and others*, (1977) 1 S.C.J. 458 : A.I.R. 1977 S.C. 244 and in *Chandrasekaran v. Kunju Vanniar and others*, (1976) 2 M.L.J. 243 : 88 L.W. 216 : A.I.R. 1975 Mad. 227, are not applicable, or the lease was initially valid and on the avoidance of the same, it become invalid from the date of avoidance. If it becomes invalid only on and from the date of avoidance, the ratio of the Supreme Court judgment will apply. If it becomes void from the inception, the tenant cannot claim any statutory right against the respondent.

8. We have already seen that clause (3) of section 8 of the Hindu Minority and Guardianship Act, 1956, specifically makes the transaction voidable. The lease executed by the guardian in this case is prohibited and in that sense it was without any authority. On the legal efficacy and the distinction between valid, void and voidable agreements, we find the following passage in Salmond on Jurisprudence, 12th Edition, at page 341:-

> "A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement not only ceases to have any efficacy, but is deemed to have been void *ab initio*. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been

attributed to it wholly disappears, as if it had never existed. In other words, available agreement is one which is void or valid at the election of one of the parties to it".

9. This distinction has also been judicially noticed in the Privy Council judgment reported in *Satgur Prasad v. Harnarain Das*, L.R. (1932) 59 I.A. 147 : 62 M.L.J. 451 : 35 L.W. 667 : A.I.R. 1932 P.C.89 and in the Division Bench judgment in *S.N.R. Sundara Rao and Sons, Madurai v. Commissioner of Income-tax, Madras*, (1957) 31 I.T.R. 449 : A.I.R. 1957 Mad. 451. The Division Bench held, following the Privy Council judgment, as follows:

"....When a person who is entitled to dissent from the alienation, does so, his dissent is in relation to the transaction as such and not merely to the possession of the alienee on the date of such dissent.

The effect of the avoidance is, therefore, to get rid of the transaction, with the result that in law it is as if the transaction had never taken place...."

10. We have, therefore, no doubt, that when the fifth respondent avoided the lease executed by his father, the fourth respondent, the lease became void from its inception and no statutory rights could, therefore, accrue in favour of the appellant herein. There are no grounds to interfere. Hence, the writ appeal fails and is dismissed. But there will be no order as to costs.

B.S. .... *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Present:- *S. Nainar Sundaram, J.*

*Writ Petition Nos. 7684 to 7686 of 1985.
26th July, 1985.

R.M.Appavu Chettiar Sons, 156-158, South Avani Moola Street, Madurai-625001.
*Petitioner**

v.

The Appellate Assistant Commisioner, Commercial Taxes, Madurai (South), Madurai and another *Respondents.*

Tamil Nadu General Sales Tax Act (I of 1959), section 31 (5) Proviso - Petitioner suffering orders of regular assessment for three years - Appeals against these orders - Pending appeals stay was sought for - Bank guarantee for the entire disputed tax furnished - Commercial Tax Officer calling upon the petitioner to pay the tax dues in instalments - Bank guarantee held to be good - Impugned orders quashed.

The petitioner in this case had suffered orders of regular assessment for the three years 1979-80, 1980-81 and 1981-82. As against this, it had preferred appeals and pending the appeals stay was asked for. Bank guarantees for the entire disputed tax in respect of all the three years had also been furnished. Yet by the impugned orders, the first respondent directed payment of the tax dues in instalments. As to the validity of the order,

Held:- When the bank guarantees are there, they will provide ample safeguard for the revenue. In the said circumstances, to call upon the petitioner to pay the very disputed tax is not only harsh but also not a judicial and a proper exercise of the power of discretion reserved for the authority like the first respondent under the proviso to section 31(5) of the Tamil Nadu General Sales Tax Act, 1959. The present impugned orders only disclose a mechanical exercise of power without resorting to the appropriate

consideration in question. It is directed that the bank guarantees already furnished by the petitioner shall hold good provided they are kept alive during the pendency of the appeals in question before the first respondent and the impugned orders are quashed. *[Para. 2]*

Case referred to:-

Doiton Prints Pvt. Ltd. v. State of Tamil Nadu, (1985) 58 S.T.C. 137.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorarified mandamus* (1) Calling for records of the case from the file of the first respondent herein in S.P.No.72 of 1985 in A.P.No.453 of 1985 dated 25.6.1985, quash the impugned order of the first respondent in S.P.No.72 of 1985 in A.P.No.453 of 1985, dated 25.6.1985 and direct the first respondent herein to grant absolute stay of collection of the disputed sales tax of Rs.10,064/- surcharge of Rs.503/-, additional tax of Rs.1,970/- and penalty of Rs.7,548/- totalling Rs.20,085/- from the petitioner herein for the assessment year 1980-81 pending disposal of the appeal in A.P.No. 453/85 under the Tamil Nadu General Sales Tax Act, 1959 on the file of the first respondent (W.P.No.7684/85) (2) Calling for the records of the case from the file of the first respondent herein in S.P.No.70 of 1985 in A.P.No.452 of 1985 dated 25.6.1985, quash the impugned order of the first respondent in S.P.No.70 of 1985 in A.P.No.452 of 1985 dated 25.6.85, and direct the first respondent herein to grant absolute stay of collection of the disputed sales tax of Rs.670/- surcharge of Rs.34/-, additional sales tax of Rs.152/- and penalty of Rs.503/- totalling Rs.1,359/- from the petitioner herein for the assessment year 1979-80 under the Tamil Nadu General Sales Tax Act, 1959 pending disposal of the Appeal in A.P.No.452 of 1985 on the file of the first respondent (W.P.No.7685/85) and (3) Calling for the records of the case from the file of the first respondent herein in S.P.No.71 of 1985 in A.P.No.454 of 1985 dated 25.6.85 and direct the first respondent herein to grant absolute stay of collection of the disputed sales tax of Rs.2,496/-, surcharge of Rs.125/-, additional tax of Rs.565/- and penalty of Rs.1,872/- under section 16(2) totalling Rs.5,050/- from the petitioner herein, for the assessment year, 1981-82 under Tamil Nadu General Sales Tax Act, 1959 pending disposal of the appeal in A.P.No. 454 of 1985 on the file of the first respondent (W.P.No.7686/85) respectively.

R. Venkataraman, for Petitioner.

R. Lokapriya, for Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- The petitioner has suffered orders of regular assessment for the three years 1979-80, 1980-81 and 1981-82. As against them, it has preferred appeals and pending the appeals, stay was sought for. It is further stated that bank guarantee for the entire disputed tax in respect of all the three years have been furnished. By the impugned orders, the first respondent has chosen to direct only payment of the tax dues in instalments.

2. Mr. Lokapriya, Additional Government Pleader, represents the respondents. The prayer in each of the three writ petitions is for the issue of a writ of *certiorarified mandamus* to quash the order, dated 25.6.85 of the first respondent and further to direct him to grant absolute stay of collection of sales tax. In support of this prayer, Mr. R.Venkataraman, learned Counsel for the petitioner, draws my attention to the pronouncement of Natarajan, J., in *Doiton Prints Pvt. Ltd. v. State of Tamil Nadu*, (1985) 58 S.T.C. 137. When the bank guarantees are there, they will provide ample safeguard for the revenue. In the said circumstances, to call upon the petitioner to pay the very disputed tax is not only harsh but also not a judicial and a proper exercise of the power of discretion reserved for the authority like the first respondent under the proviso to section 31(5) of the Tamil Nadu General Sales Tax Act 1959. The present impugned orders only

disclose a mechanical exercise of power without resorting to the appropriate consideration on the question of stay. This obliges me to interfere in writ jurisdiction. Accordingly, I direct that the bank guarantees already furnished by the petitioner shall hold good provided they are kept alive during the pendence of the appeals in question before the first respondent and the impugned orders are hereby quashed. No costs.

3. In spite of the pronouncement of this Court referred to above, I find that the authorities like the first respondent resort to passing such mechanical orders and this constrains parties like the petitioner to approach this Court in writ jurisdiction. It is high time that the highest in the hierarchy of the authorities look into the matter and give appropriate instructions to the concerned to adhere to the principles enunciated by this Court so as to avoid parties rushing to this Court for redress and relief.

R.S. ...... *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S. Swamikkannu, J.*

*C.R.P.No. 4962 of 1982. *5th April, 1984.*

L.R. Rajendran *Petitioner**

v.

Gajalakshmi *Respondent.*

Hindu Marriage Act (XXV of 1955), section 24 - Fixing quantum of interim maintenance to wife - Not restricted to one-fifth of net income of the husband as provided under section 36 of the Divorce Act - Income of brother of wife not a ground for refusing interim maintenance to wife - Grant of interim maintenance of Rs.150/- per month for wife held reasonable.

The amount payable by the husband to the wife is usually called alimony which signifies literally nourishment or substance. The word has not been used in this section because this section provides for maintenance for the husband also. Maintenance means provision for food, clothing and habitation and other necessaries for the support of the wife or the husband. Section 24 of the Hindu Marriage Act deals with temporary alimony which is synonymous with the terms alimony *pendente lite* or alimony *ad interim.* The Hindu Marriage Act itself has not set any limit to the maintenance awardable under section 24. This section empowers the Court to award such sum as it may seen to the Court to be reasonable. What is reasonable amount must differ from case to case. Neither a minimum nor a maximum can be fixed for maintenance allowance. The question must depend on the circumstances of the each case. No mechanical proportion of the income is to be awarded. *[Para. 11]*

One fifth of the net income of the respondent towards interim maintenance is not warranted and the rule has no place in the Hindu Marriage Act as section 24 itself expressly stated that the interim maintenance should be reasonable amount. For being the quantum it is only the "net" or disposable income of the respondent that should be taken into account. In determination of the amount which would be just and proper such circumstances as the liability of the parties to work and earn their own livelihood, their financial condition, their status and position in life will have to be taken into consideration. The Court should consider the means and income of the parties, the nature of the litigation and allied circumstances and the equities of the parties should be adjusted. *[Para. 11]*

Cases referred to:-

Prasana Kumar v. Sureswari, A.I.R. 1969 Ori. 12; *Mukan Kanwar v. Ajit Chand,* A.I.R. 1961 Raj. 51; *Sushila Devi v. Dhani Ram,* A.I.R. 1965 H.P. 12; *Dinesh v. Usha,* A.I.R. 1979 Bom. 178.

T. Viswanatha Rao, for Petitioner.
N. Sivamani, for Respondent.

The Court made the following

ORDER:- The respondent in I.A.No.65 of 1982 in O.P.No.235 of 1981, on the file of the learned I Additional Subordinate Judge, Madurai, is the petitioner herein. I.A.No.65 of 1982 in O.P.No.235 of 1981 was filed by the respondent (wife) under section 24 of the Hindu Marriage Act for directing the petitioner (husband) to pay to the respondent Rs.1,200/- towards legal expenses and Rs.400/- per month towards maintenance.

2. The case of the respondent/wife is as follows: She is the legally wedded wife of the petitioner herein, that the petitioner has preferred O.P.No.235 of 1981 against the respondent herein seeking a decree for divorce on the ground of cruelty and desertion. The respondent herein filed a statement of objections and she is contesting the same. In the meanwhile, she has filed I.A.No.65 of 1982 under section 24 of the Hindu Marriage Act claiming Rs.1,200/- towards legal expenses and Rs.400/- per month towards maintenance alleging that she has no property or income for her maintenance, that she is living with her aged parents as a burden to her parents and that the petitioner herein, who is the husband of the respondent, is earning monthly salary at the rate of Rs.800/- as a Government servant and that he is not providing any maintenance for her. Therefore, the respondent herein prayed for a direction to the petitioner to pay to her litigation expenses and also interim alimony as prayed for by her. According to her, she is having no income or property and her parents are also leading a very hard life and she cannot afford litigation expenses to contest the main petition instituted by the petitioner frivolously and, therefore, it is necessary to pass an order for interim maintenance and also for her litigation expenses as prayed for by her.

3. On the other hand, the case put forward by the petitioner herein in his counter-affidavit is that his monthly salary including allowances comes to Rs.382.75 after deductions and this amount is quite insufficient for his maintenance and also for the maintenance of his son Ramkumar, who is aged six years and therefore, he cannot provide any maintenance as prayed for by the respondent. He has denied that his monthly salary is Rs.800/-, that the respondent is living with her aged parents and that she is leading a hard life. He has claimed that the respondent is living with her sister's husband, a film producer and director, and that the respondent's brother is also employed under the said film producer drawing a high salary and that the respondent is also earning nearly Rs.500/- per mensem in tailoring and the said amount is more than sufficient for the maintenance of the respondent herein. The petitioner claimed that the respondent is not entitled to claim any maintenance for the reasons aforesaid and that he is leading a hard life and he finds it difficult to maintain himself and his son Ramkumar with his meagre monthly salary and as the respondent is in affluent circumstances, the respondent has to provide maintenance to him.

4. On the case put forward by the parties, the Court below framed the following point for determination:

> "Whether the petitioner (the respondent herein) is entitled to the litigation expenses and interim alimony and if so at what rate?"

No witnesses were examined on either side. Exhibit B-1, the salary certificate dated 30.6.1980 issued by the Manager, Office of the Director of Medical Services and Family Welfare, Madras, was marked on behalf of the petitioner herein. The Court below came to the conclusion that the respondent is entitled to the litigation expenses a sum of Rs.250/- and interim alimony at the rate of Rs.150/- per month from the date of filing of I.A.No.65 of 1982 till the disposal of the main petition O.P.No.235 of 1981 and accordingly allowed the application with costs. Aggrieved by the above decision of the Court below, the petitioner (husband) has come forward with this Civil Revision Petition *inter alia* contending that the Court below had not properly appreciated the case put forward by him and did not

adopt any basis or take into account any acceptable material for granting the relief prayed for by the respondent herein.

5. Mr. T.Viswanatha Rao, the learned Counsel for the petitioner, contends that the interim maintenance awarded by the Court below is excessive and the Court below ought to have taken into consideration the fact that the son of the parties, aged about 6 years is also living with the petitioner and after deduction, the petitioner is getting only Rs.558.75 per month. The learned Counsel for the petitioner further submits that as per section 36 of the Indian Divorce Act, 1869, only one-fifth of husband's net income is granted as interim maintenance and as such by applying the said principle of the Indian Divorce Act to the present case, the interim maintenance of Rs.150/- awarded to the respondent is excessive. In support of this contention, Mr. T.Viswanatha Rao, the learned Counsel for the petitioner, refers to the decision in *Prasana Kumar v. Sureswari*, A.I.R. 1969 Ori. 12. In the said decision, it was held that as for maintenance *pendente lite*, Courts generally allow it at one-fifth of the income of the husband after necessary deductions and that under the Indian Divorce Act the maximum alimony *pendente lite* has been fixed at one-fifth of the net income. Under the Hindu Marriage Act, no such limit has been prescribed. In the absence of special circumstances, maintenance should be allowed at one-fifth of the net income of the husband and as regards litigation expenses, it should be reasonable. It is also held in the said decision that in determining the quantum of maintenance the conduct of the parties is also relevant. It is permissible for the Court to go into the conduct of the wife with reference to the question whether she should be held to have forfeited her claim for maintenance in sympathy of her claim.

6. On the other hand, Mr. N.Sivamani, the learned Counsel for the respondent, submits that the Court below exercised its discretion judicially and it fixed a reasonable amount towards interim alimony taking into account the monthly salary of the petitioner and as such no deduction can be made so far as the interim maintenance of Rs.150/- per month awarded by the Court below is concerned.

7. The right of a wife for maintenance is an incident of the status or estate of matrimony. In general, therefore, the husband is bound to defray the wife's costs of any proceeding under the Act and to provide for her maintenance and support pending the disposal of such proceeding. Section 24 of the Hindu Marriage Act, 1955 deals with maintenance *pendente lite* and expenses of proceedings. It reads as follows:-

> "Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for expenses of the proceeding, it may, on application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable."

So far as Rs.250/- awarded by the Court below towards litigation expenses, is concerned it is submitted by the learned Counsel for the petitioner himself that the fixation of litigation expenses at Rs.250/- is reasonable and the petitioner has no grievance against the same. It is only with respect to the interim maintenance that is granted in favour of the respondent, it is submitted on behalf of the petitioner that the discretion vested with the Court below had not been exercised judicially.

8. Section 24 of the Hindu Marriage Act, 1955 lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the Court must have regard to the petitioner's own income and the income of the respondent. In the instant case, though it is alleged that the respondent herein is earning as a tailor, no evidence had been let in to substantiate the said contention of the petitioner herein. The petitioner

has admitted that he is employed in Government Service. According to the respondent, the petitioner is getting a monthly salary of Rs.800/-. But, according to the petitioner, his monthly salary is Rs.564/- and he is getting Rs.382.75 per month and with that meagre amount he finds it very difficult to maintain himself and his six years old son and, therefore, he cannot provide any maintenance to the respondent. To show that the petitioner's monthly salary is Rs.564/- and that he is getting, after deductions, Rs.382.75 per month, he has produced the salary certificate Exhibit B-1. From Exhibit B-1, it is seen that his monthly salary is Rs.745/- and that he is getting Rs.558.75 after deductions. The petitioner has averred that the respondent is living with her sister's husband, who is a film producer and director, and that she is in affluent circumstances. The petitioner has also stated that the respondent is getting a monthly income of Rs.500/- in doing tailoring work. The petitioner further averred in his counter that the respondent's brother one K.Gurumurthy is employed under the said film producer and he gets a high salary and, therefore, on that ground also, the respondent is not entitled to claim maintenance. The income of the brother of the respondent cannot afford a ground for refusing interim maintenance to the respondent herein. There is also no proof to show that the respondent is living with her sister's husband, who is in affluent circumstances. There is also no proof that the respondent is getting a monthly income of Rs.500/- by doing tailoring work. Therefore, the Court below is correct in rejecting the case of the petitioner herein that the respondent is an affluent circumstances and that she is not in need of any maintenance from the petitioner. The Court below is also correct in holding that the claim of Rs.1,200/- by the respondent herein towards legal expenses is excessive. The amount of Rs.250/- fixed by the Court below towards legal expenses is correct and reasonable under the circumstances.

9. The petitioner is getting a monthly salary of Rs.800/- and out of that amount, he has to pay some usual deductions like General Provident Fund, Insurance, etc. The petitioner has to maintain himself and also his son, who is aged six years. If these factors are taken into consideration, the sum of Rs.150/- per mensem awarded by the Court below towards interim maintenance to the respondent cannot be said to be either excessive or too meagre a sum. A reasonable sum had been awarded by the Court below towards interim maintenance after exercising its discretion judicially and on the basis of the evidence placed before it.

10. The Court exercises a wide discretion in the matter of granting alimony *pendente lite* but the discretion is judicial and not arbitrary or capricious. It is to be guided on sound principles of Matrimonial law and to be exercised within the ambit of the provisions of the section and having regard to the object of the Act. An order for maintenance *pendente lite* or for costs of the proceedings is conditional on the circumstances that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is also implicit in the section that the order would not be made if the respondent to the application is shown to have no property nor earning capacity, or is shown to have a very small income. But the fact that the respondent is not receiving any income from property for the time being would not be sufficient answer to the claim if the Court is satisfied that the property owned by the respondent is substantial.

11. The amount payable by the husband to the wife is usually called alimony which signifies literally nourishment or sustenance. This word has not been used in this section because the primary signification of the word is maintenance to the wife and it is not in that sense, that the word maintenance is used in this section because this section provides for maintenance for the husband also. The maintenance means provisions for food, clothing and habitation and other necessaries for the support of the wife or the husband. This section 24 of the Hindu Marriage Act deals with temporary alimony

which is synonymous with the terms alimony *pendente lite* or alimony *ad interim.* The question whether the petitioner should be granted interim maintenance is to be decided first by the Court. Thereafter the quantum that should be awarded is left to the discretion of the Court, and that discretion should not be arbitrarily exercised but should be exercised judicially to serve the interests of justice. The Hindu Marriage Act itself has not set any limit to the maintenance awardable under section 24. This section empowers the Court to award such sum as it may seem to the Court to be reasonable. What is reasonable amount must differ from case to case. Neither a minimum for a maximum percentage of the respondent's income can be fixed for the maintenance allowance. The quantum must depend on the circumstances of the case. No mathematical proportion of the respondent's income is to be awarded. Following the practice under section 36 of the Indian Divorce Act, it was held in *Prasanna Kumar v. Sureswari,* A.I.R. 1969. Ori. 12, that ordinarily in the absence of special circumstances one-fifth of the net income of the respondent should be allowed. In this regard, the decisions in *Mukan Kanwar v. Ajit Chand,* A.I.R. 1961 Raj.51, *Sushila Devi v. Dhani Ram,* A.I.R. 1965 H.P. 12 and *Dinesh v. Usha,* A.I.R. 1979 Bom. 178, may be useful. One-fifth of the net income of the respondent towards interim maintenance is not warranted and the rule has no place in the Hindu Marriage Act, as section 24 itself expressly states that the interim maintenance should be a "reasonable" amount. For fixing the quantum, it is only the "net" or disposable income of the respondent that should be taken into account. In the determination of the amount which would be just and proper such circumstances as the ability of the parties to work and earn, their financial condition, their status and position in life will all have to be taken into consideration. The Court should consider the means and the income of the parties, the nature of the litigation and allied circumstances and the equities of the parties should be adjusted.

12. The Courts should never lose sight of the fact that except in very exceptional cases, a Hindu wife never normally leaves the house of her husband and is never enamoured of staying with her parents after giving up the matrimonial home. Thus the consideration of the wife living with her parents is not relevant in determining the quantum. Since the temporary or interim allowance is awarded without going into the merits, the amount is usually less than the amount awarded as permanent maintenance and is normally restricted to the actual needs of the petitioner if living in comfortable retirement, but the amount should not be on a very parsimonious or miserly scale.

13. The Court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. At the same time, there is nothing in section 24 of the Hindu Marriage Act to prevent the Court from taking into consideration the conduct of the parties. A comparison of the language of this section with that of section 25 which deals with permanent alimony and maintenance shows that under latter section the conduct of the parties is an important factor for consideration in awarding the same. The words "conduct of the parties" do not appear in the present section but the conduct of the parties would not be ignored by the Court in making the order asked for in assessing the amount of alimony. The matter is one for the Court to deal with as it thinks just and reasonable in its unfettered discretion and the Court has the power to make an order for alimony *pendente lite* for instance in favour of a respondent wife notwithstanding the wife's adultery. Section 24 of the Hindu Marriage Act confers on the Court a general power to make orders for alimony *pendente lite* and the Court would take into consideration the whole of the circumstances of the case although the prime consideration even in such cases would be the means of the parties. The Court can in the exercise of its discretion vary an order for interim maintenance if there is such change in the circumstances of the parties justifying

variation. There is nothing in the section which can disable the Court in appropriate cases, passing an order varying, modifying, rescinding or temporarily suspending any order made by it under the section even though there is no provision relating to the same.

14. Bearing in mind the above principles relating to the provisions under section 24 of the Hindu Marriage Act, 1955, this Court is of the opinion that the Court below had exercised its discretion judicially and justly fixed the quantum of interim maintenance at the rate of Rs.150/- per mensem and had also awarded Rs.250/- towards legal expenses. There is no infirmity in the order under revision. Therefore, the civil revision petition is dismissed. Under the circumstances, there is no order as to costs.

R.S. .... *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *V.Ramaswami and K.Shanmukham, JJ.*

*A.A.O.Nos. 364 and 365 of 1984.
25th October, 1984.

The New India Assurance Co. Ltd., Madras-1 *Appellant**

v.

C.B. Shankar and others *Respondents*

Motor Vehicles Act (IV of 1939), section 96 (b) (ii), Proviso - Onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the Insurance Company - Merely proving that the driver did not have a licence on the date of accident or that he pleaded guilty and was convicted is not enough.

Under the proviso to section 96 (2) (b) (ii) of Act IV of 1939 the Insurance Company would not be liable unless 'the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence'. There could be no doubt, therefore that in order to escape liability, not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the Insurance Company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident, the driver did not have a licence and that he pleaded guilty and was convicted in a Criminal Court itself is not enough to hold that the Insurance Company is not liable for the claim. The onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the Insurance Company. *[Para. 3]*

Case referred to:-

National Insurance Co. Ltd. v. Sugantha Kunthalambal, (1981) A.C.J. 302.

J. Madanagopal Rao, for Appellant.

D. Murugesan, Chandra Bose, Chelliah and *K. Ranganathan,* for Respondents.

The Judgment of the Court was delivered by

RAMASWAMI, J.:- These two appeals have been preferred against a common order in O.P.Nos. 122 and 123 of 1982 on the file of the Additional Motor Accidents Claims Tribunal (Court of Small Causes), Madras. Due to a collision between a scooter TMP 2939 and a taxi MSV 5202, the driver of the scooter and the pillion rider, a minor son of the scooter driver, were injured. Two claim petitions were filed, one by the scooter driver and the other on behalf of the pillion rider, the minor son of the scooter driver. The scooter driver claimed Rs.25,000/- as compensation for the injuries sustained by him, while on behalf of the pillion rider, a petition claiming compensation of Rs.5,000/- for the injuries sustained by the minor was filed. The Motor Acci-

dents Claims Tribunal held that the accident was due to the rash and negligent driving of the taxi and that the claimants are entitled to the compensation. However, the Tribunal held that the scooter driver was entitled to a sum of Rs.9,630/- and the pillion rider was entitled to a sum of Rs.2,200/- only. It is against this award, the present two appeals have been filed.

2. The appellant does not dispute in these appeals that the accident was caused by the rash and negligent driving of the taxi driver. Nor does the appellant question the quantum of compensation awarded by the Tribunal. But the appellant contended that the Insurance Company was not liable at all for the reason that the driver of the taxi did not have a driving licence and that, therefore, the Insurance Company could not be held liable.

3. It is in evidence that the driver of the taxi was charged under section 3 read with section 2 (21) of the Motor Vehicles Act, in C.C.No.11634 of 1981 on the file of the V Metropolitan Magistrate's Court, Egmore, and the owner of the vehicle was charged under section 5 in the same proceeding. Both pleaded guilty and they were convicted. Under the proviso to section 96 (2) (b) (ii), the Insurance Company would not be liable unless "the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence". There could be no doubt, therefore, that in order to escape the liability not only it should be proved that the driver of the vehicle was not having a licence at the time of the accident, but also the Insurance Company should prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all. Merely proving that on the date of the accident the driver did not have a licence and that he pleaded guilty and was convicted in the criminal Court, itself is not enough to hold that the Insurance Company is not liable for the claim. It has been held by a Division Bench of this Court also in the decision reported in *National Insurance Co. Ltd. v. Sugantha Kunthalambal*, (1981) A.C.J. 302, that the onus of proving that the driver of the vehicle never had a licence or was disqualified from holding a licence is on the Insurance Company.

4. We have therefore to see whether the Insurance Company in this case has discharged that onus. The circumstances relied on in this connection by the learned Counsel for the Insurance Company is that they issued a notice to the owner of the vehicle and the Advocate appearing for the owner of the vehicle to cause the production of the driver's licence and that they failed to do so. From this itself we cannot hold that either the Insurance Company has discharged its onus or has taken all the steps that are needed to prove that the driver had no licence at any time or that he was disqualified from driving. It is not disputed that the Insurance Company was aware of the name and address of the driver. In fact, the address was available in all the proceedings in respect of this accident. However, as admitted by R.W.1, the Senior Assistant of the Company, who came and gave evidence on behalf of the Company, the investigator did not contact the driver of the vehicle, nor did they issue any notice to the driver calling upon him to produce the driving licence, if the driver had any. They could have also taken out a petition before the Tribunal itself to summon the production of the driving licence. That also has not been done. On the other hand we find that R.W.3 the owner of the vehicle, in his evidence stated that the driver was under his employment for over 2 1/2 years prior to the accident and during that time he had a driving licence. He had also stated that immediately after the accident, he left his services and he could not contact him thereafter. Though he had specifically stated that the driver had a driving licence, there was no cross-examination of the owner in this regard, as to whether he had seen the driving licence or on any other aspect. It may also be mentioned that normally one is not expected to drive for such along period as 2 1/2 years without a licence at all, particularly a taxi in the Metropolitan City of Madras. We

may also note that it is not disputed that he had been in the employment of R.W.3 as driver for 2 1/2 years. In the circumstances, therefore, we are not persuaded to hold that the Insurance Company had discharged its onus of proving that the driver never had a licence or was disqualified from holding a licence. It is not the case of the Insurance Company that the nature of things is such that we can presume that the driver could not have had any licence at all. The driver was not shown to be a minor or any other person with legal infirmity who could not hold any driving licence at all for any reason. In the circumstances, therefore, we agree with the order of the Tribunal that the Insurance Company is liable for the amount awarded. The appeals accordingly fail and they are dismissed with costs. Counsel's fee one set in C.M.A.No.364 of 1984.

B.S. .... *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Present:- *G. Ramanujam, J.*

*Writ Petition Nos.4946/78 and 9179/81.

26th April, 1985.

K. Sushila *Petitioner**

v.

The Tahsildar, Mylapore, Madras-4 and others *Respondents*

Tamil Nadu Urban Land Tax Act (XII of 1966), section 27 and G.O.No.3526, Revenue dated 15.6.73 and G.O.No.288, Revenue, dated 13.2.1976 - Granting exemption to certain categories of lands - Coconut garden whether will fall within the benefits of the two Government Orders.

As per the provisions of the concerned two Government Orders wet lands in which either wet or dry crops have been raised for five fasli years prior to the date of coming into force of the Tamil Nadu Urban Land Tax Act in the City of Madras and lands registered as dry but where dry or wet crops had been raised for five fasli years prior to the date of coming into force of the Act in the City of Madras were exempted from the provisions of the Act. Even lands which are registered as house sites and which are used under cultivation with wet or dry crop for not less than five years prior to the date of the coming into force of the Act were exempted. The lands of one S had been registered as coconut garden. It was contended that the land could not be treated either as wet or dry but that it should be treated only as a coconut garden for which the Government Orders would have no application.

Held:- It cannot be disputed that the coconut crop can be considered only as a wet crop. The user of the land for raising coconut crop is nothing but as agricultural purpose. To say that the raising of coconut crop in the land will not amount to raising of either a wet or dry crop is to completely overlook the process which is employed in growing and tendering coconut trees. The cultivation of plantain and rearing of coconut plants will clearly amount to putting the land to agricultural use. It is only by agricultural operation the coconut trees could be planted, reared, watered etc. There would not have been any classification as coconut garden apart from the usual classification either as 'dry' or 'wet' land or fallow land. If a registration as coconut garden is permissible then the land on which plantain crops are raised, should be registered as plantain garden and where sugarcane is raised, the land should be registered as sugarcane garden. If registration is to proceed on these lines, there cannot be any limit for classification. That cannot be the object which is expected to be achieved by registering the lands. In this case though originally, the land had the benefit of irrigational facility from a tank and since that tank has became useless and ceased to exist as an irrigation source, the land has to be treated only as a wet land with irrigational facilities from

two wells in which two pumpsets are said to have been installed. Thus the lands are dry lands in which wet crops such as coconut, plaintain and other vegetable crops are raised. Therefore it will squarely fall within clause (b) of the Notification issued in G.O.Ms.No. 3526, Revenue, dated 15.6.1973. Even if the land could not be taken as a dry land wherein wet crops are raised, it will clearly come within the scope of the exemption contained in G.O.Ms.No. 280, Revenue, dated 13.2.1976 for, the land, though a coconut garden on ground, has been approved as house sites even in the year 1957. Taking note of the said lay out sanction, the lands should be taken to be house sites on ground which are actually used for cultivation of coconut crop for not less than five fasli years prior to the date of coming into force of the Act in the City of Madras. Thus there is no escape from the position that in any event the petitioner's lands either on the basis that the petitioners lands are dry lands in which wet crops had been raised or on the basis that the petitioners lands are house sites in which wet or dry crop is raised are certainly entitled to the benefit of exemption under section 27 of the Act. *[Para. 9]*

Cases referred to:-

Commissioner of Income-tax, Madras v. K.R.Sundara Mudaliar, (1950) 1 M.L.J. 736 : 63 L.W. 456 : A.I.R. 1950 Mad. 566; *Commissioner of Income-tax, West Bengal, Calcutta v. Raja Benoy Kumar Sahas Roy*, (1957) 32 I.T.R. 466 : (1957) 2 M.L.J. (S.C.) 145 : (1957) 2 An.W.R. (S.C.) 145 : 1957 S.C.J. 740 : 1958 S.C.R. 101 : A.I.R. 1957 S.C. 768; *Gemini Pictures Circuit P. Ltd. v. Commissioner of Income-tax, Tamil Nadu-1*, I.L.R. (1981) 3 Mad. 321 : (1981) 130 I.T.R. 686.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue writs of (1) Declaration declaring that the provisions of the Tamil Nadu Urban Land Tax Act, 1966 are void and unenforceable in respect of the petitioner land comprised in Door No.51, Ward 27, Survey No.1330/1 (W.P.No. 4946/78) and (ii) *certiorarified mandamus* calling for the records of the 3rd respondent in Memorandum No.68524/UI/dt. 6.5.78 quash the same and direct the 3rd respondent to grant exemption in respect of the petitioner's land in T.S.No. 1330/1 of Mylapore Village, Madras City from the provision of the Tamil Nadu Urban Land Tax Act, 1966 (W.P.No.9179/81) respectively.

Selvaraj and *Julian*, for Petitioner.

K.S. Bakthavatsalam, Addl. Govt. Pleader and *P.Likapriya*, for Respondents.

The Court made the following

ORDER:- These two writ petitions have been filed by the same petitioner in respect of the same property but for two different reliefs.

2. Writ Petition No.4946/78 has been filed for the issue of a writ of declaration declaring that the provisions of the Tamil Nadu Urban Land Tax Act, 1966 are void and unenforceable in respect of the petitioner's land comprised in Door No.51, Ward 27, Survey No.1330/1..

3. Writ Petition No.9179 of 1981 is for the issue of a writ of *certiorarified mandamus* to quash the order of the third respondent dated 8th May, 1978 refusing to grant exemption under the Urban Land Tax Act and to direct the third respondent to grant the exemption in respect of the petitioner's land referred to above.

4. In Writ Petition No.9179/81, the petitioner seeks exemption for the lands in question under the provisions of the Tamil Nadu Urban Land Tax Act. I therefore proceed to deal with the petitioner's contention in Writ Petition No.9179/81 in the first instance before dealing with the case of the petitioner in W.P.No.4946/78 on merits.

5. The facts which led to the filing of these writ petitions by the petitioner may briefly be noted. The petitioner

herein admittedly owns an extent of 53 grounds and 130 sq.ft., comprised in Mylapore in T.S.No.1330/1 in Block No.27, Door No.50, Muthiah Mudali Street, Vellala Teynampet, Madras-86. In the said urban land, there are a large number of coconut trees and a portion of the land has also been used for growing vegetables, plantain and other crops. The said land was originally in the Ayacut of Mylapore Tank. After the Mylapore Tank became useless and ceased to be a source of irrigation the lands were being irrigated with the use of two wells in which electric pump sets had been installed. After the coming into force of the Tamil Nadu Urban Land Tax Act, 1966, which came into force in the City of Madras on 1.7.63, till 1975, the petitioner has been filing return on the basis that the lands are agricultural lands and therefore they are not liable to be taxed under the Tamil Nadu Urban Land Tax Authorities. However, from the year 1970 onwards, attempts have been made to bring the said urban land under the said Act. The petitioner therefore, filed an application on 11.7.75 seeking exemption for the said urban land from the purview of the Act. Pending consideration of that application, the Government stayed the collection of Urban Land Tax from the petitioner in Memorandum No.72378-R1/75-1 dated 24.7.75. However, the Government later *suo motu* vacated the stay and rejected the petitioner's request for the grant of exemption by its Memorandum No. 68524/U1/ dated 6.5.78. It is at that stage, the petitioner filed the first Writ Petition No. 4946/78 seeking declaration that the said Act is void and inoperative so far as the petitioner's land is concerned. The said writ petition was resisted by the State contending that the petitioner's lands will not fall within the exemption contemplated under section 29 of the Act. Pending that writ petition, the petitioner became aware of the two Government Orders which granted exemption in respect of certain lands on the ground that if the lands situated in the urban area registered as house sites is under cultivation with wet or dry crops they would be entitled to an exemption from the payment of urban land tax. The said two Government Orders are G.O.Ms.No.288, Revenue, dated 13.2.76 and G.O.Ms.No.3526, Revenue, dated 15.6.73. According to the petitioner even as per the said two Government Orders, her lands are liable to be exempted under the provisions of the Act and the Government has not been right in rejecting the petitioner's application for exemption under the provisions of the Act in respect of her lands. Thus the substantial question that arises for consideration in W.P.No.9179/81 is as to whether the petitioner is entitled to claim exemption in respect of the lands in question on the basis of the said two Government Orders as contended by the petitioner. In this light it has become necessary to consider the scope of the two Government Orders stated as above.

6. In G.O.Ms.No. 3526, Revenue, dated 15.6.73, the Government after taking into account the representations made on behalf of the owners of urban lands on the basis of market value of these lands which causes hardship to such of those owners of the lands, felt that it is necessary to exempt the lands genuinely used for cultivation in the normal course and granted the exemption under section 27 (1) for the following categories of land:

(a) registered as "wet" and which were under cultivation of "dry crops" for five fasli years prior to the date of coming into force of the Act in the City of Madras;

(b) registered as "dry" and which were under cultivation of "wet" or "dry crops" for five fasli years prior to the date of coming into force of the Act in the City of Madras;

In the next Government Order in G.O.Ms. No.288, Revenue Department, dated 13th February, 1976, the Government in exercise of the powers under section 27 (1) of the Urban Land Tax Act, 1966, has granted exemption in respect of urban lands which are registered as house sites and which are under cultivation with wet or dry crops for not less than five years prior to the date of coming into force of the Act in the City of Mad-

ras. Thus as per the provisions of the said two Government Orders, wet lands in which either wet or dry crops have been raised for five fasli years prior to the date of coming into force of the Act in the city of Madras, will be entitled to exemption. Similarly lands registered as 'dry' but where dry or wet crops had been raised for five fasli years prior to the date of coming into force of the Act in the city of Madras, fall within the exemption. Even in respect of lands which are registered as house sites and which are used under cultivation with wet or dry crop for less than 5 years prior to the date of the coming into force of the Act, will also fall within the exemption.

7. In this case, the lands in question are said to have been registered as coconut garden. Taking advantage of such a registration, it is the contention of the respondents that the land in question cannot be treated either as wet or dry but it should be treated only as a coconut garden for which case the Government Orders referred to above will have no application. According to the petitioner, however, the registration of land as coconut garden is itself erroneous. Normally the lands either in the Municipal or in the City are registered either as wet or dry and there is no classification as coconut garden. In any event, even assuming that the registration of the land as coconut garden has been properly done, having regard to the fact that in the lands in question coconut crops as well as plants and vegetable crops have been admittedly raised it should be taken to be dry lands wherein wet crops are being cultivated which will come within the scope of exemption contained in G.O.Ms.No.3256, Revenue, dated 15.6.73. The alternative contention is that even if the registration of the lands as coconut garden will prevent the lands being considered either as dry or wet, still the lands having been admittedly laid out as house plots, even before the coming into force of this Act, *i.e.*, as early as 12.6.57 the lands should be taken to be house sites and the crops such as coconut, vegetable, plantain, etc., having been raised in the lands, the lands will squarely fall within the scope of G.O.Ms.No. 288, Revenue, dated 13.2.1976.

8. It is in the light of these rival contentions that we have to consider the question as to whether the lands belonging to the petitioner will fall within the benefit of the said two Government Orders.

9. It cannot be disputed that the coconut crop can be considered only a 'wet crop'. Though according to the respondent growing of coconut trees in the lands cannot be taken to be a use for agricultural purposes, I am of the view that the user of the land for raising coconut crop is nothing but an agricultural purpose. To say that the raising of coconut crop in the land will not amount to raising of either a wet or a dry crop is to completely overlook the process which is employed in growing and tendering coconut trees. It has been pointed out by a Division Bench of this Court in *The Commissioner of Income-tax, Madras v. K.R.Sundara Mudaliar*, (1950) 1 M.L.J. 736 : 63 L.W. 456 : A.I.R. 1950 Mad. 566, where the scope and connotation of the word 'agriculture' came up for consideration. While dealing with the scope of the expression 'agriculture', the Court pointed out:

> "I shall briefly advert to the genesis of the provision exempting agricultural income derived from lands assessed to land revenue, as I consider that the subject matter with which the Legislature was dealing and the facts existing at the time with respect to which the legislation was made are legitimate topic for consideration in ascertaining the object and scope of the exemption from the income-tax conferred on agricultural income .. .. ..
>
> It is a matter of ordinary experience, at least in this part of the country, that mango, coconut, palmyra, orange, jack arecanut, tamarind and other trees are planted usually in an enclosed land, and that these trees do not yield any fruit or crop in the early years of their growth. They remain on the land for a long number of years yielding fruit only after their maturity. There is no reason why the planting, rearing, watering, fencing and protection of

such trees and the gathering of their fruits during the annual seasons should not be held to be 'agriculture'. There is some kind of cultivation or prodding of the soil at the inception when the planting is done and subsequently also at intervals. In the case of coffee grown on hills slopes, there is no ploughing or tillage as in the case of wet and dry fields, but it cannot be maintained that growing coffee is not an agricultural operation.

.. ..

I am unable to see why these operations are not agricultural operations. Pasture land used for the feeding and rearing of livestock is land used for agricultural purposes."

Thus it would be clear from the above extract that the cultivation of plaintain, rearing of coconut plants will clearly amount to putting the land to agricultural use. It is only by agricultural operation, the coconut trees could be planted, reared, watered etc., The learned Judges have referred to the definition of 'agriculture' in Murray's Oxford Dictionary which defines 'agriculture' as 'the science and art of cultivating the soil; including the allied pursuits of gathering in the crop. They have also referred to the various definitions occurring in other dictionaries and have ultimately held that the extent and intensity of the cultivation and the quantum of the effort and the plants of crops raised and no particular fixed standard can be prescribed as applicable to all cases. Thus though the standard or the quantum of effort and labour has been made out having regard to the nature of the land or the crops raised, it cannot be said that the coconut trees can be planted, reared and watered without the agricultural pursuits. The said decision of this Court has been approved by the Supreme Court in *Commissioner of Income-tax, West Bengal, Calcutta v. Raja Benoy Kumar Sahas Roy*, (1957) 32 I.T.R. 466 : (1957) 2 M.L.J. (S.C.) 145 : (1957) 2 An.W.R. (S.C.) 145 : 1957 S.C.J. 740 : 1958 S.C.R. 101 : A.I.R. 1975 S.C. 768. Therefore, it can be taken that wherever land has been used for planting, rearing coconut trees the same can be taken to be put to agricultural use. In *Gemini Pictures Circuit P. Ltd. v. Commissioner of Income-tax, Tamil Nadu-1*, I.L.R. (1981) 3 Mad. 321 : (1981) 130 I.T.R. 686, a Division Bench of this Court held that wherever urban land has been put to agricultural use and it does not lose its agricultural character, the sale of such lands cannot be taken to be a sale of capital asset. Though the said decision was not rendered under the provisions of the Urban Land Tax Act, the principles of the decision that so long as the land retains the agricultural character, it has to be treated as such for the purpose of the Urban Land Tax Act. In this case, the respondents, as already stated, were taking advantage of the entries found in the revenue records that the urban land is a coconut garden. As already pointed out, there would not have been any classification as coconut garden apart from the usual classification as coconut crop apart from usual classification either as 'dry' or 'wet' land or fallow land. If a registration as coconut garden is permissible then the land on which plantain crops are raised, should be registered as plantain garden and where sugar cane is raised, the land should be registered as sugarcane garden. If registration is to proceed on these lines, there cannot be any limit for classification. That cannot be the object which is expected to be achived by registering the lands. If such a classification is to be recognised, then every land will have a separate classification depending upon the crop that is raised on the lands. Therefore even though the land has been registered as coconut garden we have to find whether the land is either wet or dry. In this case, though originally the land had the benefit of irrigational facility from a tank and since that tank has become useless and ceased to exist as an irrigation source, the land has to be treated only as a 'wet land with irrigational facilities from two wells in which two electric pump sets are said to have been installed. Thus the lands are dry lands in which wet crops such as coconut plantain and other vegetable crops are raised. Therefore it will squarely fall in clause (b) of the Notification issued in G.O.Ms.No.3526, Revenue, dated 15.6.73.

It says that dry land in which 'wet' or 'dry' crops are raised for five fasli years prior to the date of coming into force of the Act in the City of Madras will be entitled to exemption. Even if the land could not be taken as a dry land wherein wet crops are raised, the petitioner's land will clearly come within the scope of the exemption contained in G.O.Ms.No.280, Revenue, dated 13.2.76 for the petitioner's land, though a coconut garden on the ground, has been approved as house sites even in the year 1957 by L.R.72/57. Taking note of the said lay out sanction, the lands should be taken to be house sites on ground which are actually used for cultivation of coconut crop for not less than five fasli years prior to the date of coming into force of the Act in the City of Madras. Thus there is no escape from the position that in any event the petitioner's lands either on the basis that the petitioner's land are dry lands in which wet crops had been raised or on the basis that the petitioner's lands are house sites in which wet or dry crop is raised are certainly entitled to the benefit of exemption under section 27 of the Act. Thus the contention urged by the petitioner in W.P.No.9179/81 is to be accepted. Hence W.P.No.9179/81 is allowed and the petitioner is entitled to exemption under both the Government Orders.

10. In view of the fact that the said Writ Petition No.9179/81 has been allowed in which the petitioner has got the relief of exemption, it is unnecessary to go into the question as to whether Urban Land Tax Act is void and *ultra vires*. Hence W.P.No. 4946/78 is dismissed as unnecessary without going into the merits. There will be no order as to costs.

B.S. .... *W.P.No.9179/81 allowed.*
W.P.No. 4946/78 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *G. Maheswaran, J.*

*Second Appeal No. 2021 of 1979.
12th September, 1984.

V.S. Meenakshisundaram and others *Appellants**

v.

Kaliyaperumal and others *Respondents*

(A) Transfer of Property Act (IV of 1882), section 54 - Sale of immovable property of value below Rs.100/- Sale deed not registered - Effect.

(B) Registration Act (16 of 1908), sections 17 and 49 - Scope and applicability.

Held:- Apropos of section 49 of the Registration Act, the Supreme Court decision in *Raghunath v. Kedarnath*, (1970) 1 S.C.J. 63 : A.I.R. 1969 S.C. 1316, holding that the enactment of Act XXI of 1929 which inserted in section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act" 1882, has made it clear that the documents in the supplemental list, that is, the documents of which registration is necessary under the Transfer of Property Act, fall within the scope of section 49 of the Registration Act and if not registered, and are not admissible as evidence of any transaction affecting any immovable property comprised therein and therefore do not affect any such immovable property, it is obvious that the concerned documents namely the unregistered sale deeds and the exchange deed in the instance are inadmissible in evidence. *[Para. 5]*

Cases referred to:-

Kuppuswami v. Chinnaswami, A.I.R. 1928 Mad.546; *Raghunath v. Kedarnath*, (1970) 1 S.C.J. 63 : (1969) 1 S.C.C. 497 : A.I.R. 1969 S.C. 1316.

Ravirajapandian, for Appellants.
N.M. Muthurajan, for Respondents.

The Court delivered the following

JUDGMENT:- The plaintiffs are the appellants. The suit out of which this second appeal arises was one for recovery of possession filed by the plaintiffs and for recovery of Rs.900/- towards damages. The suit property is called Thathankuttai Aru Pangu Annabishega Pudhuvadai. It is covered by Resurvey No.111/13 in Vishnupuram Village. The plaintiffs claim title to suit property by virtue of certain purchases ranging from 1905 to 1929. According to them, they were in possession and enjoyment of the suit property, that certain sales in their favour were made by registered documents and other sales were by unregistered documents and they are only to confirm the oral sales made by them. The plaintiffs have been paying kist and enjoying the coconut trees planted on the suit property. Though the extent is 20 cents, the road comprised one cent. According to the plaintiffs, the defendants are in illegal possession and enjoyment of the suit property and therefore the plaintiffs have to file the suit for recovery of 19 cents of the suit property.

2. The defendants resisted the suit and stated that the plaintiffs have no title to the property and that in any event the defendants have perfected title by adverse possession.

3. The trial Judge held that the plaintiffs have title to suit property and that the defendants have not prescribed title by adverse possession. He also fixed the past profit at Rs.250/- per annum. The defendants appealed. In appeal, the learned appellate Judge found joint possession of the plaintiffs along with other owners of about six cents of land and in regard to the remaining 14 cents, he found that the sale deed which are unregistered documents are not admissible in evidence and, in the end, negatived to claim of the plaintiffs and dismissed the suit. He did not grant any relief with reference to six cents of property as exclusive enjoyment of those six cents had not been proved by the plaintiffs. The plaintiffs have filed this second appeal.

4. A learned Judge of this Court admitted the second appeal and formulated the following substantial question of law:

"Whether the lower appellate Court is right in rejecting Exhibits A-3 to A-10 on the ground of want of registration, especially when they are for consideration less than Rs.100/-?" ('Exhibits A-3 to A-10' should read as 'Exhibits A-4 to A-10').

5. Exhibits A-1 and A-2 are the two sale deeds, which have been indisputably proved to be sale deeds in favour of the predecessor in interest of the plaintiffs. But, what has been purchased is only an undivided 6 cents under these two documents. The appellate Court clearly found that the plaintiffs' predecessor in interest was in joint possession along with the other owners in respect of the 6 cents of property. As regards the remaining 14 cents, it is stated that Exhibits A-4 to A-10, which are unregistered sale deeds, are inadmissible in evidence, even though the sale consideration under each is below Rs.100/-. Learned Counsel for the appellants-plaintiffs contended that under section 17 of the Registration Act, there is no need for registration of a sale deed of the value below Rs.100/-. He also invited my attention to section 54 of the Transfer of Property Act. Section 54 of the Transfer of Property Act runs thus:-

"*Section 54*:- 'Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

'Such transfer in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument."

"In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property."

'Delivery of tangible immovable property

takes place when the seller places the buyer, or such person as he directs, in possession of the property."

"A contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties."

"It does not, of itself, create any interest in or charge on such property."

A Division Bench of this Court in *Kuppuswami v. Chinnaswami*, A.I.R. 1928 Mad. 546, in dealing with section 54 of the Transfer of Property Act, pointed out that the document, which, being a contract in writing, required by law to be registered because under section 54 a transaction of sale if in writing has to be registered, is not so registered, it is invalid. But, it is pointed out by the learned Counsel for the appellants that section 17 does not require a sale below Rs.100/- in value, to be registered. In this connection, reference is made to section 49 of the Registration Act as it stands after amendment in 1929. That section states:-

"No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or concerning such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act to be registered, may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, or as evidence of part performance of a contract for purposes of section 53-A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by registered instrument."

In dealing with section 49 of the Registration Act, the Supreme Court, in *Raghunath v. Kedarnath*, (1970) 1 S.C.J. 63 : (1969) 1 S.C.J. 497 : A.I.R. 1969 S.C. 1316, pointed out that by the enactment of Act XXI of 1929 which, by inserting in section 49 of the Registration Act the words, "or by any provision of the Transfer of Property Act, 1982, "has made it clear that the documents in the supplemental list, that is, the documents of which registration is necessary under the Transfer of Property Act, but not under the Registration Act, fall within the scope of section 49 of the Registration Act and if not registered, are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. Therefore, it is obvious that these documents, *viz.*, Exhibits A-4 to A-8 and A-10 which are registered sale deeds and Exhibit A-9, an unregistered exchange deed, are inadmissible in evidence. That disposes of the substantial question of law formulated in the second appeal.

6. That apart, the appellate Judge has clearly pointed out that it is not the case of the plaintiffs that on the date of these documents, possession was also delivered. But, learned Counsel appearing for the appellants strongly attacks this observation in the judgment which says that it is very much their case that on the dates of the sale deeds possession was delivered. But, it should also be pointed out that the learned appellate Judge has stated that there is absolutely no acceptable evidence by the plaintiffs as to which portion of the land or lands under Exhibits A-4 to A-10 had been handed over to the plaintiffs. On the view, the appellate Court is right in coming to the conclusion that the plaintiffs have not proved title to 14 cents and that they have established their title only to 6 cents. As regards adverse possession set up by the defendants, both the Courts have concurrently found that the defendants have not proved title to the suit property by adverse possession. It is now contended for the appellants

by their learned Counsel that, having found title to the 6 cents of land, the appellate Court ought not to have dismissed the suit in toto. It is seen from the judgment of the appellate Judge that the plaintiffs' predecessor in interest had been only in joint possession along with other owners in respect of the 6 cents of land and therefore, the plaintiffs cannot claim exclusive enjoyment of 6 cents and cannot also claim delivery of the 6 cents. Learned Counsel pointed out that in any event, the plaintiffs will be entitled to 6 cents of land, but the Counsel for the respondents pointed out that the only remedy for the plaintiffs is to ask for partition, bringing on record all the sharers. The appellants can seek their remedy by asking for partition of the 6 cents of land if they are so advised. With these observations, the second appeal is dismissed. There will be no order as to costs.

B.S. .... *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *K.M. Natarajan, J.*

*Civil Revision Petition Nos.3937 and 3938 of 1981. *17th July, 1985.*

Smt. Sri Lakshmi *Petitioner**

v.

Muthuveeran Chettiar and others *Respondents*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), section 14 (1) (b) - Petition by landlady for eviction on ground of requirement for demolition and reconstruction - Eviction ordered by Rent Controller - Order set aside on appeal - Revision against appellate order - Contention that Appellate Authority (Principal Subordinate Judge) had no jurisdiction to transfer appeal to II Additional Subordinate Judge - Order passed by the Second Additional Subordinate Judge, whether valid.

Held:- By virtue of the Notification dated 18.4.1979, Explanation (ii), wherein the Principal Subordinate Judge was empowered to exercise the appellate jurisdiction in places where there are more than one Subordinate Judge, was deleted. It is clear from the above notification as it existed on the date of filing of the appeal, the II Additional Subordinate Judge, Tiruchirapalli was empowered to dispose of the appeal. Under rule 17, the District Judge is empowered to transfer from one appellate authority to another under two circumstances, namely (1) on an application by any party in the appeal or otherwise and (2) when the appellate authority before whom the appeal is pending is personally interested in the appeal and reported the same to the District Judge. In the instant case, the appeal was made over to the Additional Subordinate Judge administratively by the Principal Subordinate Judge. Under section 4-A of the Tamil Nadu Civil Courts Act, 1873 it has been provided that subject to the general or special orders of the District Judge, the Principal Subordinate Judge may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof. *[Para. 2]*

The Principal Subordinate Judge exercising the power of Appellate Authority is a Court and his act of making over the appeal for disposal to the II Additional Subordinate Judge who is conferred with the power of disposal of appeal is perfectly in order. The instant case is not one of lack of jurisdiction. *[Para. 2]*

Cases referred to:-

E.K. Venkai Marban v. Dakshinamurthy, (1981) 94 L.W. 243; *Central Talkies Ltd. v. Dwarka Prasad,* (1962) 2 S.C.J. 41 : (1961) 3 S.C.R. 495 : A.I.R. 1961 S.C. 606; *Rathinasamy v. Komalavalli,* (1982) 2 M.L.J. 406 : (1982) 95 L.W. 552 : A.I.R. 1983 Mad. 45; *Kiran Singh v. Chaman Pawan,* 1954 S.C.J. 514 : (1955) 1 S.C.R. 117 : (1954) 2 M.L.J. 60 : A.I.R. 1954 S.C.

340; *United Commercial Bank Ltd. v. Their Workmen*, 1951 S.C.J. 334 : 1951 S.C.R. 380 : A.I.R. 1951 S.C. 230; *Kanakavel Pillai v. Drugs and Chemicals*, (1980) 2 M.L.J. 392; *S.A. Ahmed v. Alagar*, (1983) 96 L.W. 239; *Rukmani Ammal v. V.K.Isudden*, (1983) 1 M.L.J. 186 : (1983) 1 R.C.J. 640 : A.I.R. 1983 Mad. 303 : (1983) 96 L.W. 145; *G.K. Jose v. Ramathal*, (1979) 1 M.L.J. 372 : 92 L.W. 315; *Sambasivam v. Abdul Sattar*, (1982) 1 M.L.J. 75 : (1982) 95 L.W. 58; *Metalware and Company v. Bansilal Sarma*, (1980) 1 M.L.J. (S.C.) 1 : (1979) 2 S.C.J. 377 : (1979) 3 S.C.C. 398 : (1979) 2 R.C.J. 452 : A.I.R. 1979 S.C. 1559; *Bharat Trading Company v. Shanmughasundaram*, (1982) 95 L.W. 258.

K. Raman, for Petitioner.

P.S. Srisailam and *E.Padmanabhan*, for Respondents.

The Court made the following

ORDER:- Landlady is the petitioner in both the revisions. She has filed H.R.C.O.P. Nos.473, 474 and 475 of 1977 for eviction of three tenants who are occupying different portions of the premises bearing Door No.162, Big Bazaar Street, Tiruchirapalli, on the ground that she requires the same for the immediate purpose of demolition and reconstruction under section 14(1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act (Tamil Nadu Act 18 of 1960). The petitions which are the subject matter of these two revisions are H.R.C.O.P.Nos.474 and 475 of 1977. According to the petitioner, her husband is running embroidery business and in order to improve the said business, she wants the building to be demolished and reconstructed. It is also urged that the building is very old. The said claim was resisted by all the three tenants on the ground that the petitioner had filed prior applications for eviction on different grounds and she was unsuccessful and in order to secure enhanced rate of rent and pagadi these petitions have been filed. The petitioner has no resources to reconstruct the building. Further, the building is in a very good condition and it does not require any demolition and reconstruction. The learned Rent Controller accepted the case of the petitioner and ordered eviction. Aggrieved by the same, the tenants preferred C.M.A.Nos. 15, 17 and 18 of 1979 and the learned Appellate Authority allowed the appeals and set aside the order of eviction. Aggrieved by the same, they have preferred three revision petitions. It is stated that so far as the respondent in C.R.P.No.3936 of 1981 is concerned, after the filing of the revision petition, he has settled the matter and vacated the premises and as such the same was not pressed and it was already disposed of. Hence the remaining two petitions alone are to be disposed of.

2. Learned Counsel for the petitioner in both the revisions raised a preliminary point regarding the jurisdiction of the Appellate Authority to enquire into the appeal. According to the learned Counsel, the Principal Subordinate Judge has no jurisdiction to transfer these appeals for disposal to the II Additional Subordinate Judge, as he was only a *persona designata* and since the very made over itself is without any jurisdiction, the order passed by the II Additional Subordinate Judge is not valid and is liable to be set aside and the matter has to be remanded back to the Principal Subordinate Judge, who is having jurisdiction to dispose of the case. In support of the above contention, the learned Counsel for the petitioner cited the decision of this Court in C.R.P. Nos. 1578 and 1579 of 1980. In a similar situation, Ratnam, J., held that the transfer effected by the Principal Subordinate Judge would not be in order and that it is only the District Judge who can effect such a transfer. On that ground the order passed by the II Additional Subordinate Judge, Tiruchirapalli was set aside and the matter was remitted back to the Principal Subordinate Judge to re-hear and dispose of the same. On the other hand, the learned Counsel for the respondent drew my attention to *E.K. Venkai Marban v. Dakshinamurthy*, (1981) 94 L.W. 243, wherein Balasubrahmanyan, J., while considering the applicability of section 5 of the Limitation Act to the Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), held that the Appellate Authority is a Court and

not *persona designata*, relying on the decision of the Supreme Court reported in *The Central Talkies Ltd. v. Dwaraka Prasad*, (1962) 2 S.C.J. 41 : (1961) 3 S.C.R. 495 : A.I.R. 1961 S.C. 606. Subsequently it was also approved by a Division Bench of this Court in *Rathinasamy v. Komalavalli*, (1982) 95 L.W. 552 : (1982) 2 M.L.J. 406 : A.I.R. 1983 Mad. 45. It was also brought to my notice that under section 4-A of the Tamil Nadu Civil Courts Act. 1873, the Principal Subordinate Judge is empowered to make such arrangement as he thinks fit for distribution of cases and by virtue of the said provision, the made over effected by him is valid. I find that in view of the ratio laid down in the above quoted decisions, coupled with the provisions of the Tamil Nadu Civil Courts Act, the madeover effected by the Principal Subordinate Judge is in order and it cannot be said to be in any way beyond his jurisdiction and invalid. The State Government has empowered all the Subordinate Judges to dispose of appeals arising under the Tamil Nadu Buildings (Lease and Rent Control) Act (Act 18 of 1960) by effecting necessary amendments to the rules, and as such I do not find any merit in the contention of the learned Counsel for the petitioner that the transfer effected by the Principal Subordinate Judge to the Additional Subordinate Judge is invalid. Learned Counsel for the respondents drew my attention to the changes effected by way of notification regarding the conferment of powers of Appellate Authority on certain officers for the purpose of the Act. In the Government Gazette Extraordinary dated 30.6.1973, all Subordinate Judges within their respective jurisdiction on Tiruchirapalli and other Districts mentioned therein, were conferred with the power of Appellate Authority for the purpose of the Tamil Nadu Act 18 of 1960. By virtue of notification dated 18.4.1979, Explanation (ii) wherein the Principal Subordinate Judge was empowered to exercise the appellate jurisdiction in places where there are more than one Subordinate Judge was deleted. It is clear from the above notification as it existed on the date of filing of the appeal, the II Additional Subordinate Judge, Tiruchirapalli was empowered to dispose of the appeal. Learned Counsel for the petitioner submitted that it is only the District Judge who is empowered under rule 17 to transfer appeal from one appellate authority to another and as such, the Principal Subordinate Judge has no power to transfer the appeal. Under rule 17, the District Judge is empowered to transfer from one appellate authority to another under two circumstances, namely (1) on an application by any party in the appeal or otherwise and (2) when the appellate authority before whom the appeal is pending is personally interested in the appeal and reported the same to the District Judge. In the instant case, the appeal was made over to the Additional Subordinate Judge administratively by the Principal Subordinate Judge. Under section 4-A of the Tamil Nadu Civil Courts Act, 1873, it has been provided that subject to the general or special orders of the District Judge the Principal Subordinate Judge may from time to time make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof. As already stated, the madeover has been made only under the said provision. The only question that remains for consideration is, whether the Principal Subordinate Judge exercising the authority of Appellate Authority is a Court. In the Bench decision of this Court reported in *Rathinaswamy v. Komalavalli*, (1982) 2 M.L.J. 406 : 95 L.W. 552, it was held that "for the purpose of sections 3, 5 and 29 (2) of the Indian Limitation Act, the Appellate Authority is a Court and that section 5 of the Limitation Act is applicable to an appeal preferred by the petitioner herein before the Appellate Authority, constituted under section 23 (1) (b) of the Madras Buildings (Lease and Rent Control) Act 18 of 1960." In the above quoted decision, the earlier decision reported in *E.K. Venkai Mariban v. Dakshinamurthy*, (1981) 94 L.W. 243 and rendered by Balasubrahmanyan, J., was approved. The above Bench decision was not brought to the notice of Ratnam, J., while disposing of the above quoted C.R.P.Nos. 1578 and 1579 of 1980. Relying on the decision of the Division Bench and that of the decision of the Supreme Court reported in *Central Tal-*

kies v. Dwaraka Prasad, (1962) 2 S.C.J. 41 : A.I.R. 1961 S.C. 606, I entirely agree with the contention of the learned Counsel for the respondent that the Principal Subordinate Judge exercising the power of Appellate Authority is a Court and his act of making over the appeal for disposal to the II Additional Subordinate Judge who is conferred with the power of disposal of appeal is perfectly in order. Learned Counsel for the respondents also submitted that since the petitioner has not raised any objection before the Appellate Court and since it has not been raised as a ground even in this revision the petitioner is estopped from raising the point in this revision consequent upon his acquiescence. Learned Counsel for the petitioner on the other hand, drew my attention to the decisions reported in *Kiran Singh v. Chaman Paswan*, (1954) 2 M.L.J. 60 : 1954 S.C.J. 514 : (1955) 1 S.C.R. 117 : A.I.R. 1954 S.C. 340 and the *United Commercial Bank Ltd. v. Their Workmen*, 1951 S.C.J. 334 : 1951 S.C.R. 280 : A.I.R. 1951 S.C. 230 and submitted that if there is defective jurisdiction, whether it is pecuniary or territorial, it cannot be cured by consent of the parties and there is no question of waiver. The proposition laid down in those decisions is not disputed. But the only question is whether the said principle would be applicable if the II Additional Subordinate Judge was not having any power to hear the appeal. But in the instant case, it is not one of lack of jurisdiction. As such, those decisions are not applicable to the facts of the case. From the foregoing discussion, I hold that the order passed by the Principal Subordinate Judge making over the appeal to the II Additional Subordinate Judge is perfectly legal and valid.

3. Next we have to consider, whether there is any case made out for interference with the order passed by the Appellate Authority. The only ground on which eviction was sought is immediate demolition and reconstruction under section 14 (1)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act for developing the embroidery business done by the husband of the petitioner. The Appellate Authority held that the said requirement was not *bona fide* and that this petition was filed only to evict the respondents in order to fulfil her long desire to evict them under the guise of demolition and reconstruction. Let us consider the reasons set out in the order passed by the Appellate Authority in support of his finding. It is not in dispute that the very same petitioner-landlady has filed an application, H.R.C.O.P.No. 27 of 1972 on the allegation that she requires the premises for additional accommodation for embroidery and readymade garments business for the same. The same was dismissed holding that the requirement of the petitioner was not *bona fide*, by the Rent Controller as well as the Appellate Authority and it has become final on 27.4.1977 and no revision has been filed against the said order. The present application has been filed on 12.10.1977. Even the petitioner had admitted in her evidence that she has filed the present application four months after the disposal of the said previous application. The Appellate Authority for the reasons assigned in his order held that the petitioner failed to establish even in this petition that she is having a flourishing business after the death of her husband in embroidery and that she required additional accommodation. The next main ground on which the claim was negatived is that admittedly the petitioner obtained the approved plan Ex.A-1 which shows that the petitioner proposed to remove the low terrace of Madras terraced roof and to put up a R.C.C. roof in the ground floor and the first floor. P.W.1 herself admitted in her evidence that she is not going to change the plan, but she wants to construct only as per Ex.A-1 plan. Though P.W.2 Engineer is examined and through him Ex.A-2 estimate was filed, he has categorically stated that he had prepared Ex.A-2 only with reference to Ex.A-1 and that Ex.A-1 is only for change of roof. This admission of P.W.2 in his evidence is sufficient to reject Ex.A-2 which was filed only for the first time on the date when P.W.1 was examined, that is, a year after the filing of the petition. Even though the estimate was prepared for demolition and reconstruction it is not in accordance with the plan Ex.A-1. There is absolutely nothing to show from

the evidence of the petitioner that she had changed the proposal and that she proposed to effect complete demolition and reconstruction of the building. The Appellate Authority has rightly held that Ex.P-2 was prepared with the help of P.W.2 who was not the author of Ex.A-1, at a later stage during the pendency of the case in order to substantiate the allegations before Court. Learned Counsel for the respondents drew my attention to the decisions reported in *Kanakavel Pillai v. Drugs and Chemicals*, (1980) 2 M.L.J. 392 and *S.A. Ahamed v. Alagar*, (1983) 96 L.W. 239 in support of his contention that change of roof would not amount to demolition and reconstruction and it would not fulfil the requirements under section 14(1)(b) of the Tamil Nadu Act 18 of 1960. Learned Counsel for the petitioner is unable to dispute the proposition. But he only relied on the evidence of P.W.2 and Ex.A-2 and the same has been rightly rejected by the Appellate Authority. There is absolutely nothing to hold that there was a proposal to demolish the entire building and effect reconstruction. Learned Counsel for the petitioner next submitted that the Appellate Authority is thoroughly wrong in saying that on the date when the petition was filed she was having a bank balance of Rs.29.43 and subsequently during the pendency of the application, she deposited a sum of Rs.9,000/- in three instalments and that she has not established that she has got sufficient means to put up the construction. Learned Counsel for the petitioner relied on the decision reported in *D.Rukmani Ammal v. V.K. Isuddan*, (1983) 1 M.L.J. 186 : (1983) 1 R.C.J. 640 : (1983) 96 L.W. 145 : A.I.R. 1983 Mad. 303, wherein Nainar Sundaram, J., held that

> "the means of the landlord to carry out the work of demolition and reconstruction is a relevant factor to be taken note of and considered while testing his *bona fides*. But this does not necessarily mean that the landlord should jingle the coins before the Controller to establish this factor."

It is further observed:

> "If the petitioners have proved that they are capable of raising funds for the purpose of such demolition and reconstruction, as was done before, the Rent Controller and as was accepted by him, this would suffice for the purpose."

I am in entire agreement with the view expressed in the above quoted decision. Even though the amount was deposited subsequent to the filing of the petition, it cannot be said that the petitioner failed to prove means to execute the work of demolition and reconstruction. It was next contended by the learned Counsel for the petitioner that obtaining of licence from the Municipality for construction is not essential for instituting the proceedings under section 14(1)(b) and the same can be obtained even after the filing of the application. In support of the above contention, the learned Counsel for the petitioner relied on the decision reported in *G.K.Jose v. Ramathal*, (1979) 1 M.L.J. 372 : 92 L.W. 315, wherein Ramanujam, J., held:

> "The Court could not make out how the obtaining of a plan subsequent to the filing of the eviction petition would show that the requirement of the premises by the landlady for the purpose of demolition and reconstruction was not *bona fide*."

In the above quoted case, it was found that the building was very old and that the landlady has got ample means to undertake the work of demolition and reconstruction. In the circumstances, it was held that the obtaining of the plan subsequent to the filing of the petitioner would not show that the requirement is not *bona fide*. But in the instant case, it is not the case of the petitioner that that she is going to change the plan already obtained and she would obtain a fresh licence. But on the other hand, it has been elicited in cross-examination that she is not going to change the plan but would put up construction according to Ex.A-1 and in the circumstances of the case, the above decision would not be helpful to the petitioner herein. In

this connection the learned Counsel for the respondent submitted that in the instant case, the petitioner has produced Ex.A-1 plan for change of Madras roof into R.C.C. terrace and also filed Ex.A-2 plan, which is completely at variance with Ex.A-1 plan. The above act of the petitioner is producing two different plans and estimate itself shows *mala fide* on the part of the petitioner. My attention was drawn to the decision reported in *N. Sambasivam v. Abdul Sattar*, (1982) 1 M.L.J. 75 : (1982) 95 L.W. 58, wherein two sanctioned plans were filed for the same construction. There was no explanation for production of two sanctioned plans for the same construction. There was also no explanation as to why a condition for demolition *i.e.*, stipulating the period within which the demolition to be made, is imposed only in one of them. In those circumstances, it was held that the requirement of the petitioner is not *bona fide*. Learned Counsel for the petitioner also submitted that even though it was held by the Supreme Court in *Metalware and Co., etc. v. Bansilal Sarma and others*, (1980) 1 M.L.J. (S.C.) 1 : (1979) 2 S.C.J. 377 : (1979) 3 S.C.C. 398 : (1979) 2 R.C.J. 452 : A.I.R. 1979 S.C. 1559, that the existing condition of the building, age and the situation are relevant factors for finding out whether the requirements is *bona fide* under section 14(1)(b) of the Act, those conditions are not *sine quo non* for maintaining this application. In this connection, my attention was drawn to the decision reported in *Bharat Trading Co. v. K.Shanmughasundaram*, (1982) 95 L.W. 258, wherein it was held:

> "In a case of claim under section 14(1)(b) of the Act, it is not necessary for the landlord to establish that the building is in such a condition that it will crumble down in the near future. The landlord is entitled to demolish even a building which is not like to crumble down in the near future provided that he had a *bona fide* intention of demolishing the building and construct a new building in that place. The condition of the building is relevant only for ascertaining the *bona fides* of the landlord in the sense that no landlord will demolish a building which is in good condition unless a better structure is to be put up in that place so as to get a better return from the same."

It was further held:

> "If the intention of the landlord for demolition and reconstruction is proved to be genuine and not spurious or spacious, he will be entitled to obtain an order for eviction under section 14 (1) (b) whether or not the condition of the building is such as to require immediate demolition, the age and dilapidated condition of the building not being a *sine quo non* for such eviction."

In the instant case, it has been established that the intention of the landlady is neither genuine nor *bona fide*. On the other hand, from her own admission, it is clear that the occupancy of the respondent had not caused inconvenience to the petitioner and that she had been asking the respondents to vacate the premises for the last 20 years. As such, this petition is filed only to fulfil her long desire to evict them. As such, even applying the ratio laid down in the said decision to the facts of the case, the petitioner is not entitled to claim eviction of the tenant under section 14 (1) (b) of the Act. For the foregoing discussion, I am of the view that the order passed by the Appellate Authority is to be upheld and no interference is called for in these revisions. Consequently these two revisions fail and are dismissed. In the circumstances of the case there will be no order as to costs in these revisions.

R.S. .... *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *M.N. Chandurkar, C.J. and K.Venkataswami, J.*

*Writ Appeal No. 360 of 1979 against W.P.No. 2368 of 1979. *18th June, 1985.*

P. Mariappan *Appellant**

v.

The Government of Tamil Nadu, represented by the Secretary to Government, Forest and Fisheries Department, Madras-9 and others *Respondents*

Constitution of India (1950), Article 309 - Rule 39 (a) of the General Rule for the Tamil Nadu State and Subordinate Services - Administrative order regularising services of temporarily appointed persons retrospectively prejudicing rights of direct recruits regularly appointed through the Tamil Nadu Public Service Commission in clear vacancies - Order held bad and quashed.

The Director of Statistics made temporary appointments by transfer to the category of Assistant Statistical Investigators under rule 39 (a) of the General Rules for the Tamil Nadu State and Subordinate Service. On 4.9.1971 there was one order of appointment in respect of 77 persons. The appellant M and several other persons were direct recruits to the post of Assistant Statistical Investigators having been appointed through the Tamil Nadu Public Service Commission with effect from 5.2.1972. The recruitment rules made under Article 309 of the Constitution of India were amended on 19.10.1973, two of the amendments being given retrospective effect from 15.11.1968 and the third from 15.7.1969. The new rule provided that for the purpose of promotion or recruitment by transfer the persons concerned must possess a degree with statistics, mathematics or economics as the main subject and must have put in a service of not less than two years in the category of Supervisors or Junior Assistants as the case may be. A proviso was then introduced that the qualification specified above should not be insisted upon. in the case of Supervisors and Junior Assistants who entered into service in the Department of Statistics prior to 15th November, 1968, and who possessed the minimum general educational qualification. The Government regularised the service of all the persons who were originally appointed under rule 39 (a) of the General Rules by an order dated 4.9.1971. The effect was that they became seniors to the persons like the appellant who were appointed as direct recruits with effect from 1.2.1972. A seniority list was made giving these 77 persons placements higher to the appellant and others like him. This list was challenged.

Held:- Undoubtedly rules under Article 309 of the Constitution can be made with retrospective effect. Making the rules retrospective in operation and making appointments in accordance with such rules are two different things. The power to make rules is a legislative power and therefore can be exercised retrospectively. When in the light of such rules some appointments are being made with retrospective effect, it is purely an administrative act. Such an administrative act, if it prejudicially effects vested rights of other Government employees, then, to that extent, such administrative act will become unfair and arbitrary. When the rules were given retrospective effect and a proviso was introduced to the effect that the qualification of possessing a degree with statistics, mathematics and economics shall not be insisted upon in the case of Supervisors and Junior Assistants, who entered service in the Department of Statistics prior to 15.11.1968 that did not have the effect of enabling the State Government to make appointment retrospectively to the prejudice of those who were already appointed in clear vacancies through the Public Service Commission. The effect of the amended rules and the introduction of the proviso was that those of the Junior Assistants and Supervisors who were promoted temporarily by the order dated 4th September, 1971 and who were not qualified merely became qualified for being considered for appointments. Becoming qualified for being considered for appoint-

ment cannot be equated with getting a right to be appointed retrospectively with effect from the date on which all the temporary appointments were made. 77 of the vacancies having been filled up by direct recruitment and those 77 vacancies being the first available vacancies, any appointment made even in accordance with the rule would have effect only after 1.2.1974. The Director of Statistics was, therefore clearly not entitled to give seniority to the persons whose appointments have been regularised so as to adversely affect the vested rights of the directly recruited persons who held the posts in a substantive capacity. They could not have, therefore, become junior to those whose appointments were regularised merely because by way of temporary arrangement they were appointed on 4th September, 1971 under rule 39 (a) of the General Rules. *[Para. 9]*

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice V.Ramaswami dated 20.6.1979 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2368 of 1979 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G.O.Ms.No.123, Forests and Fisheries Department, dated 19.10.1983 as well as G.O.No.655, Forests Department, dated 1.7.1977 and to quash the same.

The Judgment of the Court was delivered by

CHANDURKAR, C.J.:- This appeal highlights yet another instance of how the State Government has gone out of its way to accommodate temporarily appointed persons and regularising their services retrospectively prejudicing the rights of direct appointees who have been regularly appointed through the Tamil Nadu Public Service Commission in clear vacancies. We are concerned with appointments to the posts of Assistant Statistical Investigators. Regular recruitment rules made by the Governor under Article 309 of the Constitution of India on 17th of May, 1966 provided for appointment of Assistant Statistical Investigators in the Department of Statistics by direct recruitment by promotion and recruitment by transfer.

2. On 4th September, 1971, the Director of Statistics made temporary appointments by transfer to the category of Assistant Statistical Investigators under rule 39(a) of the General Rules for the Tamil Nadu State and Subordinate Service. There is one order of appointment in respect of 77 persons. These 77 persons are at serial numbers 86 to 164 in the seniority list at page 55 of the paper book. The appellant is a direct recruit to the post of Assistant Statistical Investigator, having been appointed through the Tamil Nadu Public Service Commission with effect from 5th February, 1972. Apart from the appellant there were several other persons who were also appointed as direct recruits. Their names are to be found in the seniority list from serial numbers 166 to 250.

3. The recruitment rules made under Article 309 of the Constitution of India were amended on 19th October, 1973 and they were given retrospective effect from 15th of November, 1968 in so far as two amendments were concerned, and the third amendment was given retrospective effect from 15th of July, 1969. We are concerned with the amendment relating to the post of Assistant Statistical Investigators. The first amendment which is relevant is that while retaining the three modes of appointment to the post of Assistant Statistical Investigators, that is, by direct recruitment or by promotion from the category of Supervisors in the Department of Statistics or by recruitment by transfer from the category of Junior Assistants in the Department of Statistics, a percentage was fixed to be filled up by direct recruit and by promotion or by recruitment by transfer. 75% of the vacancies was to be filled up by direct recruitment and 25% by promotion or recruitment by transfer. We are not concerned with the rule relating to direct recruitment. While providing for promotion or recruitment by transfer, the new rule provided that the person

concerned must possess a degree with statistics, mathematics, or economics as the main subject and must have put in a service of not less than two years in the category of Supervisor or Junior Assistant, as the case may be. A proviso was then introduced as follows:-

"Provided that the qualification specified in item (1) above shall not be insisted upon in the case of Supervisors and Junior Assistants who entered into service in the Department of Statistics prior to 15th November, 1968 and who possess the minimum general educational qualification."

There is now no doubt that this proviso was introduced and reservation of 25% posts for promotees as was made in expressly for the purpose of facilitating the absorption of the temporarily appointed persons in substantive vacancies. These rules having been given retrospective effect the Government lost no time in regularising the services of all the persons who were originally appointed under rule 39 (a) of the General Rules by the order dated 4th September, 1971. The effect of this regularisation, according to the State Government was that they became part of the cadre of Assistant Statistical Investigators with effect from their date of initial appointment, namely 4.9.1971 with the inevitable result that they became seniors to the persons like the appellant who were appointed as direct recruits with effect from 1.2.1972.

4. A seniority list came to be made giving these 77 persons placements higher to the appellant and others like and all these 77 regularised persons found their places in the seniority list between two groups of directly recruited persons. This seniority list is now challenged by the appellant. The contention is very simple. The appellant contends that he having been appointed by direct recruitment through the Public Service Commission he cannot become junior to those who were on the date of his appointment wholly unqualified and could not have been appointed to the post of Assistant Statistical Investigator. In the petition the appellant has also challenged the validity of the amended rules and has asked for quashing of the recruitment rules dated 19th October, 1973 and the seniority list based as a result of the implementation of these recruitment rules.

5. The learned single Judge, while rejecting the petition, took the view that if the respondents whose placement in the seniority list was challenged were entitled to promotion then the date on which they were promoted or should be deemed to have been promoted shall naturally be the date for the purpose of ascertaining the seniority. In view of the amended rules, according to the learned Judge, persons who were only temporarily appointed earlier were validly appointed from the date of their initial appointment and the appellant could not therefore, make a grievance against the seniority list.

6. Mr. Peter Francies appearing on behalf of the appellant has contended that by an administrative order of regularisation of the employees who were originally appointed by promotion the appellant's rights by virtue of his having been appointed as a direct recruit cannot be affected even assuming that the recruitment rules could be validly made retrospectively. The learned Government Pleader appearing on behalf of the State has contended that by the amended rules a percentage was fixed between direct recruits and promotees and in the 25% of posts to which promotees could admittedly be appointed, the State Government in view of the amended rules under Article 309 of the Constitution of India, was competent to regularise the promotions of all the Junior Assistants and Supervisors who were originally appointed under rule 39 (a) of the General Rules by the order dated 4th September, 1971.

7. Having heard the learned Counsel for the appellant and the learned Government Pleader, we are satisfied that there is a clear infirmity in the seniority list which is impugned in this appeal. We may, however, add at this stage and make it clear that the appellant has no grievance in respect of serial numbers 86 (V.Kalidoss), 87 (P.Povas), 88 (C.S.Saran-

gapani) and 92 (T.Jagannathan). These are respondents Nos. 3, 4, 5 and 9. This is because according to the appellant they were qualified even according to the old rules and were entitled to be appointed under the old rules.

8. Now it has to be noticed in this case that when temporary appointments were made by the Director of Statistics on 4th September, 1971 they were purely temporary appointment under rule 39 (a) of the General Rules. This Court had occasion to point out in an earlier judgment that rule 39 (a) contemplates only an appointment where there is an emergency, which means that regular appointments are likely to take time and the power under rule 39 (a) is a power to make a purely temporary appointment. We had also occasion to point out that rule 39 (c) clearly provided that temporarily appointed persons shall be replaced as soon as possible by the member of the service who is entitled to the promotion under the rules. Even under rule 39(a)(ii) it is provided that if a person does not have the necessary qualification, he shall be replaced as soon as possible by promoting a person possessing such qualification. Now, while these temporarily promoted persons were performing the functions of the Office of the Assistant Statistical Investigator the appellant and 76 other persons like him were appointed by the Public Service Commission. These appointments were made in February, 1972. The fact is that these appointments were for 77 vacancies out of the total number of vacancies and those vacancies were immediately filled up by these 77 persons. Any appointment made thereafter would be only in respect of vacancies which are available after these 77 vacancies are excluded. Necessarily persons who are appointed after these persons are appointed will be junior to these persons who are appointed by direct recruitment. When these persons were appointed in February, 1972 fictionally 77 of the vacancies must be taken to have been filled up.

9. Undoubtedly rules under Article 309 of the Constitution of India can be made with retrospective effect. Making the rules retrospective in operation and making appointments in accordance with such rules are two different things. The power to make rules is a legislative power and, therefore, can be exercised retrospectively. When in the light of such rules some appointments are being made with retrospective effect, it is purely an administrative act and such an administrative act, if it prejudicially affects vested rights of other Government employees then to that extent such administrative act will become unfair and arbitrary. It is this that has happened in the present case. When the rules were given retrospective effect and a proviso was introduced to the effect that the qualification of possessing a degree with statistics, mathematics and economics shall not be insisted upon in the case of Supervisors and Junior Assistants who entered service in the Department of Statistics prior to 15.11.68, that did not have the effect of enabling the State Government to make appointments retrospectively to the prejudice of those who were already appointed in clear vacancies through the Public Service Commission. The effect of the amended rules and the introduction of the proviso was that those of the Junior Assistants and Supervisors who were promoted temporarily by the order dated 4th September, 1971 and who were not qualified originally merely became qualified for being considered for appointment. Becoming qualified for being considered for appointment cannot be equated with getting a right to be appointed retrospectively with effect from the date on which all the temporary appointments were made. 77 of the vacancies having been filled up by direct recruitment and those 77 vacancies being the first available vacancies, any appointment made even in accordance with the rule would have effect only after 1.2.74. The Director of Statistics was, therefore, clearly not entitled to give seniority to the persons whose appointments have been regularised so as to adversely affect the vested rights of the directly recruited persons who held the posts in a substantive capacity. They could not have, therefore, become junior to those whose appointments were regularised merely because by way of temporary arrangement they were appointed on 4th September, 1971, under rule 39(a) of the

General Rules. We are, therefore, of the considered view that the Director of Statistics was clearly in error in making the seniority list relying upon the amended rules dated 14th October, 1978 so as to give the originally temporary appointed persons seniority over the directly recruited persons. Accordingly to this limited extent we quash the seniority list and direct the State Government not to disturb seniority of the appellant and the other persons who have been appointed directly and the benefits of regularisation would be given to those persons only after the date of appointment of the directly recruited Assistant Statistical Investigators. The appeal is therefore allowed. The State Government will pay the costs of the appellant. (Rs.250/- Counsel's fee).

B.S. .... *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Present:- *G.Ramanujam, J.*

*Writ Petition No. 1806 of 1982.
21st November, 1984.

Mookan Ambalam *Petitioner**

v.

The Revenue Divisional Officer, Madurai and others *Respondents*

Tamil Nadu Debt Relief Act (XXXI of 1976) - Person claiming benefits under that Act while Act XIII of 1980 was in force - Claim rejected - Cannot be held entitled to benefit of Tamil Nadu Act XIII of 1980 without its being the subject-matter of any claim.

A person filed an application claiming relief under Tamil Nadu Act XXXI of 1976 on the ground that he was an agricultural labourer entitled to the benefits of the Act. It was opposed and it was held that he was not an agricultural labourer and he could not claim the benefits of Tamil Nadu Act XXXI of 1976. On appeal, he was held not entitled to the benefits of Tamil Nadu Act XXXI of 1976 but that he was entitled to the benefits of Tamil Nadu Act XIII of 1980 even though it was not claimed. This order was challenged.

Held:- The person's claim for benefits was only under Act XXXI of 1976 and at no stage, he claimed benefits under Act XIII of 1980. If really he wanted the benefits under Act XIII of 1980, he could have amended his original application claiming benefit under Act XXXI of 1976 or filed another application claiming benefit under that Act. As a matter of fact, the application claiming benefit under Act XXXI of 1976 had been filed on 14.5.1980 while the Act XIII of 1980 had come into force from 19.4.80. Therefore, he was in a position to claim benefits under Act XIII of 1980 even when he filed the application on 14.5.80 claiming benefits under Act XXXI of 1976. When he has not claimed specifically or otherwise any benefit under Act XIII of 1980, the appellate authority ought not to have granted relief under Act XIII of 1980 while holding that he was not entitled to the benefits under Act XXXI of 1976. The subject-matter of appeal was as regards the person's entitlement for the benefits under Act XXXI of 1976. His entitlement if any, under Act XIII of 1980 was not the subject-matter of appeal. *[Para. 2]*

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records comprised in the proceedings of the first respondent, dated 6.7.1981 in his Pa.Mu.No.AP/DR/A/8/81, and quash the said order of the first respondent, dated 6.7.1981.

R. Muthu Kumaraswamy, for Petitioner.

C.Chinnaswami, Addl. Govt. Pleader and *N. Venugopala Nayagar,* for Respondents.

The Court made the following

ORDER:- The petitioner is a creditor who had advanced certain sums of money to the third respondent on the mortgage of his property. The third respondent filed an application on 14.5.1980 before the second respondent claiming relief under Tamil Nadu Act 31 of 1976 on the ground that he is an agricultural labourer entitled to the benefits of that Act. The said application was opposed by the petitioner on the ground that the third respondent was not an agricultural labourer and therefore, he cannot claim the benefits of Tamil Nadu Act 31 of 1976. The contention was accepted by the second respondent who rejected the application on the ground that the third respondent being not an agricultural labourer, cannot claim the benefits of Tamil Nadu Act 31 of 1976. As against the said order rejecting his application the third respondent filed an appeal before the first respondent. The first respondent had upheld the order of the second respondent holding that the third respondent is not entitled to the benefits of Act 31 of 1976, he being neither a small farmer nor an agricultural labourer. He however proceeded to hold that nevertheless, the third respondent is entitled to the benefits of Tamil Nadu Act 13 of 1980 as his family income is less than Rs.4,800/- per year. The said order of the first respondent dated 6.7.1981 granting relief to the third respondent under Act 13 of 1980 had been challenged in this writ petition on two substantial grounds, namely (1) when the respondent has claimed the benefits only under Act 31 of 1976 and his request having been rejected, the first respondent has no jurisdiction to consider his claim for benefits under Act 13 of 1980 and (2) that in any event, the first respondent had no material before him to hold that the family annual income of the third respondent was less than Rs.4,800/- especially when the enquiry before the original authority, the second respondent was not in relation to that question as the third respondent never claimed to be under Act 13 of 1980 and the income limit of Rs.4,800/- is material for the application of Act 13 of 1980..

2. On a due consideration of the matter, I am of the view that both the contentions urged on behalf of the petitioner have to be accepted as tenable. In this case, the order of the second respondent clearly says that the petitioner applied for relief under Tamil Nadu Act 31 of 1976 on the ground that he is an agricultural labourer. But the second respondent found from the income certificate issued by the competent authority that the petitioner's principal means of livelihood is not derived from agriculture or agricultural lands but it represents handicaped pension and his major son's monthly salary in a coir making factory. On this basis, the second respondent held that as the third respondent is neither a landless agricultural labourer nor a small farmer as defined in section 3 of Act 31 of 1976, he is not entitled to claim the benefits under that Act. When the matter was taken up on appeal to the first respondent, the decision of the second respondent on the question as to whether the petitioner is entitled to the benefits of Act 31 of 1976 has been upheld. But the first respondent holds that the third respondent is entitled to the benefits of Act 13 of 1980 as his annual income is less than Rs.4,800/-. As already stated, the 3rd respondent's claim for benefits was only under Tamil Nadu Act 31 of 1976 and at no stage, he claimed benefits under Act 13 of 1980. If really he wanted the benefits under Act 13 of 1980, the third respondent could have amended his original application claiming benefit under Act 31 of 1976 or filing another application claiming benefit under that Act. As a matter of fact, the application filed before the second respondent seeking benefits under Act 31 of 1976 has been filed on 14.5.80 while the Act 13 of 1980 has come into force from 19.4.1980. Therefore, he was in a position to claim benefits under Act 13 of 1980 even when he filed the application even on 14.5.1980 claiming the benefits under Act 31 of 1976. When the third respondent has not claimed specifically or otherwise any benefit under Act 13 of 1980, I do not see how the first respondent can sit in appeal against the order of the second respondent holding that the third respondent is not entitled to the benefits under Act 31 of

1976 and granting relief under Act 13 of 1980. It is significant to note that the subject matter of appeal before the first respondent was as regards the third respondent's entitlement for the benefits under Act 31 of 1976. His entitlement if any, under Act 13 of 1980 was not the subject matter of appeal before the first respondent. Therefore, the first respondent cannot proceed to decide the question as to whether the petitioner is entitled to the benefits under Act 13 of 1980 or not in the appeal filed by him against the order passed by the second respondent holding that he is not entitled to the benefits under Act 31 of 1976. Therefore, that portion of the order of the first respondent which declares that the third respondent is entitled to the benefits of Act 13 of 1980 should be taken to be without jurisdiction and that portion of the order will stand quashed. The writ petition is ordered accordingly. But there will be no order as to costs.

B.S. .... *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *G.Ramanujam and M.A.Sathar Sayeed, JJ.*

*W.A.No. 42 of 1979. *10th January, 1985.*

The Management of Mount Mettur Pharmaceuticals Ltd. *Appellant**

v.

The Presiding Officer, II Addl. Labour Court, Madras and others *Respondents*

Industrial Disputes Act (14 of 1947), section 25-F - Retrenchment of workmen - Reference to Labour Court - Finding that the action of the management was bona fide - Duty of the Labour Court in the circumstances - Mere infringement of section 25-F does not necessarily entail direction of reinstatement - Discretion to be exercised by directing suitable compensation to be given.

It is not the law that in every case of infringement of section 25-F of the Industrial Disputes Act, the award of reinstatement with back wages is a must by the Labour Court. In cases where the management is found to be justified in effecting retrenchment and its decision to effect retrenchment is not *mala fide*, the Labour Court will be exercising its discretion properly if a suitable compensation in lieu of reinstatement with back wages is ordered. In this case, the Labour Court has proceeded on the basis that since there is infringement of section 25-F, it should straightaway grant the relief of reinstatement with back wages, ignoring the fact that discretion is left with the Labour Court either to direct reinstatement with back wages or to award compensation instead. Since the Labour Court has not directed its mind on this aspect as to the relief to be granted to the concerned four workmen, we set aside the order of the learned Judge and also the award passed by the Labour Court and direct the Labour Court to pass fresh orders fixing the suitable compensation is lieu of reinstatement for these four workmen. *[Para. 6]*

Case referred to:-

Coimbatore Pioneer, B.Mills v. Presiding Officer, Labour Court, (1979) 1 L.L.J. 41.

Sanjay Mohan, for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

RAMANUJAM, J.:- This appeal filed by the Management of Mount Mettur Pharmaceuticals Ltd., Madras, is directed against the judgment of V.Ramaswami, J. upholding the award of the Labour Court dated 4th May, 1979 in I.D.No.192 of 1977.

2. The appellant, in view of the recession towards the end of 1975 and the beginning of March, 1976 effected, reduction of labour and that resulted in the retrenchment of 15 of its workers. That gave rise

to a reference to the Labour Court on the question of non-employment of the said 15 workmen and the said reference was taken on file in I.D.No.192 of 1977. The claim petition filed before the Labour Court in the said reference by the workmen was to the effect that there had been a contravention of section 25-F of the Industrial Disputes Act in effecting retrenchment and that therefore, all of them should be reinstated in service with full back wages. The said claim was opposed by the appellant-management before the Labour Court on the ground that all the petitioners were casual employees, that the retrenchment was due to *bona fide* reasons of recession and non-availability of work and that, therefore, the petitioners are not entitled to seek relief either on the basis of the infringement of section 25-F or otherwise. The Labour Court, on a consideration of the rival contentions, held that the retrenchment effected by the management was *bona fide* and that out of the 15 workers who were casual, only four had put in a service of 240 days within the 12 calendar months immediately prior to the date of retrenchment and that therefore, except claim Nos.6, 11, 14 and 15, the rest are not entitled to any relief. Thus the Labour Court has proceeded on the basis that the retrenchment was justified and that though section 25-F has been violated the claimants, other than claimant Nos.6, 11, 14 and 15 are not entitled to any relief for violation of section 25-F for the reason that they have not worked for 240 days within the 12 calendar months preceding the order of retrenchment so as to enable them to get the benefit of section 25-F. As regards the other four workmen who were found to have worked for more than 240 days in the 12 calendar months preceding the order of retrenchment, the Labour Court held that for the infringement of section 25-F, the order of retrenchment so far as they are concerned cannot be taken to be valid and hence they are entitled to be reinstated with full back wages.

3. The said order of the Labour Court was challenged by the management in W.P.No.2775 of 1978 and V.Ramaswami, J., has upheld the award of the Labour Court granting to the four workmen who had put in a service of 240 days within 2 calendar months immediately prior to the date of retrenchment the benefit of reinstatement with full back wages. It is the said order of the learned single Judge which is under challenge before us.

4. The learned Counsel for the appellant-management puts forward two contentions. They are: (1) the Labour Court having held that the retrenchment is not *mala fide* but one which could be justified on the facts of this case, erred in directing the reinstatement with full back wages ignoring the petition which had been established by the evidence on record that the management is in doldrums and is not in a position to provide work for the retrenched personnel, and (2) on the facts and circumstances of this case, the Labour Court is in error in awarding the relief of reinstatement with full back wages and that only an award of compensation is called for, in this case. Though the learned Counsel for the appellant contended that the finding of the Labour Court that the concerned four workmen have put in more than 240 days of service in the year preceding the order of retrenchment, he is not able to successfully challenge that finding in view of the fact that Ex.M-6 shows exactly the number of days worked by the employees for the period from the 1st April of the preceding year to 31st March of the succeeding year while the number of days worked in the year immediately preceding the date of retrenchment will have to be taken as the relevant factor for the purpose of applying section 25-F. In this case, two statements have been filed to show the number of days worked by the 15 workmen, one by the management which is for the period from 1st April of the preceding year ending with the end of March of the succeeding year, and the other by the workmen showing exactly the number of days worked by them in the year preceding 26th February, 1976 which is the date of retrenchment. The Labour Court seems to have accepted the statement given by the workmen as it gives the number of days worked

in the relevant year. The learned Counsel for the appellant would say that Ex. M-8 having been accepted by the Labour Court itself, it cannot ignore Ex.M-8 for the determination of the number of days worked by the workmen during the relevant period. It is no doubt true that Ex.M-8 has been accepted as genuine by the Labour Court and that is, taken as the basis for its finding that the management is not in a position to give sufficient work to the workmen and therefore, there was justification for effecting retrenchment. As already stated, Ex.M-8 does not give the number of days worked by the concerned workmen during the relevant period, that is, from 1st March, 1975 to 28th February, 1976. It is for that reason that the Labour Court has not referred to Ex.M-8 for the purpose of determining the question as to how many days the workmen had been employed on by the management during the one year period prior to the date of retrenchment. In this view of the matter, we are not in a position to disagree with the finding of the Labour Court that four out of the 15 workmen have worked for more than 240 days during the relevant period.

5. The Labour Court has also found specifically that though there was justification for retrenchment, the retrenchment has not been effected following the procedure in section 25-F and therefore the persons who have put in 240 days of service in the relevant period are entitled to claim relief on the basis of the infringement of section 25-F. The learned Counsel for the appellant is not in a position to challenge the finding of the Labour Court that there has been a violation of section 25-F in this case. We have to therefore proceed on the basis that there is, in fact, a violation of section 25-F while retrenching all the 15 workmen.

6. The question which remains for consideration is as to whether the four workmen who are found to have put in 240 days of service in the relevant period are entitled to claim retrenchment with full back wages as has been directed by the Labour Court. The learned Counsel for the appellant contends that since the company is not in a sound financial condition and that it is also not possible to provide work for these workmen continuously, the Labour Court should not have awarded the relief by way of reinstatement with full back wages, but instead it should have awarded some compensation for the concerned four workmen who are only casual employees. In support of this submission, the learned Counsel refers to the decision of this Court in *Coimbatore Pioneer B. Mills v. Presiding Officer, Labour Court*, (1979) I L.L.J. 41, wherein a Division Bench of this Court has clearly ruled that in a case where to the satisfaction of the Court it is established that there was need and necessity for retrenchment in the industry and the management for valid and legal reasons decided to retrench, the Labour Court would have to consider whether it will be just and reasonable to order reinstatement while it gives a finding that section 25-F has not been complied with and that it cannot be said that the Labour Court has no option except to order reinstatement with back wages in all cases of non-compliance with section 25-F, even in a case where the Labour Court finds that there was need for retrenchment and that the retrenchment was *bona fide*. The Court further held that in cases where there is need for retrenchment and the management have acted *bona fide* in effecting retrenchment non-compliance with section 25-F will give the Labour Court a discretion either to order reinstatement or payment of compensation in lieu of reinstatement, depending on the facts and circumstances of each case. In this case, the question is whether the Labour Court considered the facts and circumstances of this case while ordering reinstatement with full back wages. As a matter of fact, the Labour Court in its award has specifically held that the retrenchment effected by the management was justified and it is not *mala fide* and it is only on that basis the claims made by the other workmen were dismissed. Having come to the conclusion that there has been an infringement of section 25-F by the management in the process of effecting retrenchment, the Labour Court straightway proceeded to award the relief of

reinstatement with full back wages without exercising its discretion either to direct reinstatement with full back wages or direct payment of compensation in lieu of reinstatement. According to the learned Counsel for the appellant, in this case since the company is in doldrums and it is not in a position to provide work for the labour, it has resorted to retrenchment and that retrenchment has been found by the Labour Court to be *bona fide*. In such cases, to direct reinstatement with back wages would virtually drive the management to close its undertaking because of the additional *(sic)* burden caused by giving effect to the judgment of the Labour Court directing reinstatement with full back wages. On the materials, the Labour Court itself found that the affected workmen are casual workers and the management is not in a position to provide work for the retrenched personnel. In the face of such finding, to direct the management to reinstate the concerned workmen with back wages cannot be taken to be just and reasonable. In cases where the Labour Court specifically finds that the retrenchment effected by the management is justified and not *mala fide*, the Labour Court should exercise discretion and pass, instead of directing reinstatement with back wages, an award directing a just amount of compensation in lieu of reinstatement. As already stated, it is not the law that in every case of infringement of section 25-F, the award of reinstatement with back wages is a must by the Labour Court. In cases where the management is found to be justified in effecting retrenchment and its decision to effect retrenchment is not *mala fide*, the Labour Court will be exercising its discretion properly if a suitable compensation in lieu of reinstatement with back wages is ordered. In this case, the Labour Court has proceeded on the basis that since there is infringement of section 25-F it should straightway grant the relief of reinstatement with back wages, ignoring the fact that discretion is left with the Labour Court either to direct reinstatement with back wages or to award compensation instead. Since the Labour Court has not directed its mind on this aspect as to the relief to be granted to the concerned four workmen, we set aside the order of the learned Judge and also the award passed by the Labour Court and direct the Labour Court to pass fresh orders fixing suitable compensation in lieu of reinstatement for these four workmen.

7. The writ appeal is allowed accordingly. There will be no order as to costs.

R.S. .... *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- G. *Ramanujam and N.A.Sathar Sayeed, JJ.*

*Writ Appeal Nos. 188 to 190/83.
22nd January, 1985.

The State of Tamil Nadu, represented by the Commissioner and Secretary, Home Department, Madras-9 and another *Appellants**

v.

N.F. Veeraraghavan and others *Respondents*

Fundamental Rules, Rule 56 (d) - Petitioner employed in Police Service - Adverse remarks made in confidential sheet - Compulsory retirement of the petitioner ordered - Order based on the confidential sheet - Order cannot legally be sustained.

Adverse remarks had been made against the respondent, Deputy Superintendent of Police in respect of his services on 31.12.1976 for the period ending 30.9.1976, and again on 10.9.1977 for the period ending 31.3.1977. Appeals for the expunction of the remarks were rejected. On the basis of the remarks the respondent was on 13.10.1977 compulsory retired from service. Subsequently on 24.5.1978 the respondent was declared to have satisfactory completed his probation as Deputy Superintendent. **Writ Petitions filed in these circumstances by the respon-**

dent against his retirement was allowed. On appeal,

Held:- In this case, the first respondent completed 25 years of qualifying service in 1973 and that is not in dispute. No review was undertaken on the basis of completion of 25 years of qualifying service. He has completed 50 years of age on 8.1.1977 and as per paragraph 4 of the concerned Government Order his case should have been sent up for review before 1st July, 1975. However, the first respondent's case was referred to the Review Committee some time later in January, 1977. Therefore there is a clear violation of the time-limit prescribed in the said Government Order which has been held to be mandatory. That the reference is belated has been admitted in the supplemental counter-affidavit and the only stand taken therein by the appellants is that the belated reference of the first respondent's case for review will not vitiate the ultimate order passed by the first appellant compulsorily retiring him, as the recommendations of the Review Committee are only advisory in nature. Such a contention that the belated review will not vitiate the order of compulsory retirement cannot be accepted. Hence the order of compulsory retirement passed against the first respondent cannot legally be sustained in view of the decision of the Full Bench of this Court in 1984 Writ Law Reporter 1. In this view, the ultimate conclusion of the learned single Judge that the order of compulsory retirement is illegal and is not valid has to be upheld but on a different ground. The result is that Writ Appeal No.189 of 1983 has to be dismissed and it is dismissed accordingly. There will be no order as to costs. *[Para. 4]*

Case referred to:-

P.A. Manickam v. Govt. of Tamil Nadu, (1984) Lab. I.C. 1085 : (1984) Writ Law Reporter 1.

Appeals under clause 15 of the Letters Patent against the Order of Mr.Justice Sathiadev, dated 24.1.1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 3990, 3991 and 3992/78 presented under Article 226 of the Constitution of India to issue writs of 1) *certiorari* calling for the records in R.C.No.686/CBI/77 dated 10.5.77 and in R.C.No.1853/CB-1/76 dated 21.12.1976 respectively from the 2nd respondent and quash the same as invalid, illegal and *ab initio* void and as made against the principles of natural justice and award costs of the petition (in W.P.No.3990 of 1978 & 3992/78) and 2) *certiorarified mandamus* calling for the records on the file of the 1st respondent in Memo No.SC/5048/10/77 dated 20.7.78 confirming G.O.Ms.No.2755, Home, dated 13.10.1977 made under F.R.Rule 56(d) of the Fundamental Rules of the Tamil Nadu Government and quash the same and consequently direct the 1st respondent to permit the petitioner to continue in service as on 13.10.1977 and award costs of the petition (in W.P. No.3991/78) respectively.

C. Chinnaswami, Special Government Pleader, for Appellants.

K.V. Padmanabha Rao, for Respondents.

The Judgment of the Court was delivered by

RAMANUJAM, J.:- These writ appeals filed by the State are directed against the common judgment of Sathiadev, J., dated 24th January, 1983 in W.P.Nos. 3990, 3991 and 3992 of 1978 holding that the order of compulsory retirement passed under rule 56(d) of the Fundamental Rules is invalid in law and that the adverse remarks made in his confidential sheet by the second respondent cannot properly form the basis for the order compulsorily retiring him from service.

2. The circumstances under which the said three writ petitions came to be filed may briefly be stated. The first respondent in these appeals joined the police service as a Sub-Inspector in 1948. He was elevated to the post of Inspector in the year 1964. Later in the year 1974 he was promoted as Deputy Superintendent of Police. In the usual course he was posted as Deputy Superintendent of Police, Uthamapalayam. While serving at Uthama-

palayam, an adverse remark had been made on 21.12.1976 for the period ending 30.9.1976 by the second respondent in these writ appeals who was the Deputy Inspector General of Police, Madurai Range, under whose jurisdiction the first respondent was working. When the said adverse remarks were communicated to the first respondent, he filed an appeal to the second appellant, namely, Inspector General of Police, and sought for expunction of the said remarks. But the said appeal has been rejected. An over adverse remark was made by the second respondent on 10.5.1977 for the period ending 31.3.77. As against this adverse remark, the first respondent again filed an appeal seeking the expunction; but the said appeal was also rejected by the second appellant. Based on the said two adverse remarks, the first appellant has passed an order dated 13.10.1977 compulsorily retiring the first respondent from service under rule 56 (d). After the said order of compulsory retirement had been passed, on 24.5.1978 the first respondent was declared, to have satisfactorily completed the probation as Deputy Superintendent of Police. It is in these circumstances the first respondent chose to file the above three writ petitions. W.P.No.3990 of 1978 has been filed for quashing the adverse remark dated 10.5.1977 and W.P. No.3992 is for quashing the adverse remark dated 21.12.1976 and W.P.No.3991 of 1978 is for the issue of a writ of *certiorarified mandamus* to quash the order of compulsory retirement dated 20.7.1978 and for a direction to continue him in service as and from 13.10.1977. The substantial contentions urged by the first respondent in the writ petitions are as follows: (i) that the second respondent had no justification for making such adverse remarks in question and (ii) that the adverse remarks have no factual basis and that in any event the said adverse remarks cannot form the basis for an order of compulsory retirement under rule 56 (d). Subsequently by filing an additional affidavit the first respondent questioned the order of compulsory retirement on the ground that the order of compulsory retirement having been passed on a belated review of his case, the same should be held to be invalid. The above contentions of the first respondent were met by the appellants contending that the second respondent as a superior and who is empowered to make entries in the confidential files had made the entries in the course of carrying out his duties and therefore they are entitled to be given due weight and that the appeals filed against the said adverse remarks having been rejected by the second respondent, the first respondent cannot now question the action taken by the first appellant to compulsorily retire him from service based on the said remarks. As regards the complaint of the first respondent that the reference to Review Committee is belated and therefore the review should be held to be bad, the supplemental counter-affidavit filed on behalf of the appellants proceeds on the basis that the belated review by the Review Committee cannot be a bar for compulsorily retiring a Government servant and that the orders passed by the Review Committee are only recommendatory in nature and that therefore the belated review by the Review Committee could not by itself have the effect of vitiating the order of compulsory retirement passed by the Government in exercise of the power vested with them as per the decision of this Court in *V.B.Manavarajan v. State of Tamil Nadu*, W.P.No.4523 of 1980. After considering these rival contentions, Sathiadev, J., has held that the adverse remarks have no factual basis and therefore they cannot form the basis for the order of compulsory retirement against the first respondent. The learned Judge has not, however, gone into the question as to whether the review was in time and whether the belated review, if any, could vitiate the order of compulsory retirement. As regards the prayers sought for in the two writ petitions directed against two sets of adverse remarks; the learned Judge directed the Appellate Authority, the second appellant, to dispose of the appeal filed by the first respondent for expunction of the remarks afresh after giving an opportunity to the first respondent to put forward his objections as regards the additional material that was brought in in the report of the second respondent with reference to the appeal

filed by the first respondent. Writ Appeals Nos. 188 and 190 of 1983 have been filed by the State against the order of the single Judge remitting the appeal filed by the first respondent seeking expunction of adverse remarks. Having regard to the fact that the learned single Judge has merely directed a fresh disposal of the appeals filed by the first respondent against the adverse remarks, there is considerable justification for the learned Judge to direct a fresh disposal of those appeals in view of the fact that the second respondent has brought in new materials in his remarks sent to the second appellant, we do not think that any interference is called for with the order of the learned Judge on this aspect of the case. Hence, W.A.Nos.188 and 190 of 1983 are dismissed.

3. Coming to W.A.No.189 of 1983 which is directed against the order of the learned single Judge quashing the order of compulsory retirement, as we have already said the learned Judge has held that the adverse remarks not being based on any factual material, no order of compulsory retirement could be passed on these adverse remarks. Though the learned Government Pleader very vehemently contends that the learned Judge has acted as if he were the Appellate Authority over the decision of the first appellant to compulsorily retire the first respondent from service and the Court having no such appellate power, the order in the writ petition could not be sustained in law, we feel that it is unnecessary to go into that question as the writ petition has to be allowed on the other ground raised by the first respondent. As already stated one of the contentions urged by the first respondent in the additional affidavit filed by him is that there has been a belated review of his case by the Review Committee and the recommendations made on such a review cannot legally be sustained. This point has been countered by the appellants on the ground that merely because the review is belated, the recommendations made by the Review Committee and the ultimate order passed by the Government based on the recommendations of the Review Committee cannot be said to be vitiated in any manner and the counter affidavit filed by the appellants relied on a decision of this Court in *V.B. Manavarajan v. State of Tamil Nadu*, W.P.No. 4523 of 1980. The stand taken by the appellants that merely on the basis that the review is belated the order of compulsory retirement cannot be said to be vitiated is no longer tenable in view of the decision of the Full Bench of this Court in *P.A. Manickam v. Government of Tamil Nadu*, (1984) Writ Law Reporter 1 : (1984) Lab. I.C. 1085. The Full Bench in that case has held that the time-limit prescribed for making a review in G.O.Ms.No.761, Pulic (Services-A) Department, dated 19.3.1973 is mandatory and if the review is not undertaken before the time-limit prescribed in the said Government Order, the review should be taken to be invalid. The said Government Order contains the following provisions as paragraph 4.

"4. The Government also direct that cases coming up for retirement during the first half year of any year shall be sent up for review before the 1st July of the previous year. The case of persons who are due for review in the second half of any year shall be sent before the 1st January of the year."

Construing the said provisions, the Full Bench has held that it is mandatory that the review should be undertaken within the time-limit prescribed in the said paragraph and if it is not done within the time prescribed therein, it should be presumed that no grounds are made out for compulsory retirement. The reasoning of the Full Bench is as follows:-

"The question that arises for consideration in such circumstances is as to what is the effect of not referring the matter to the review committee six months before the officer attained the age of 50 years or completed 25 years of service. Since there is a direction to all the Heads of Departments to submit their proposals with recommendation asking for a certain officer to be retired from service to the administrative department in the secretariat six months before the date of review and the secretariat in turn to place the

proposal before the review committee in accordance with the instructions for their consideration, there is a duty cast on all the Heads of Departments and the Departments of the Secretariat to consider every one of the cases of persons who are due for review in accordance with the instructions, and in such circumstances, it shall be presumed that if an officer's name had not been sent up to the review committee, the Heads of Departments and the Government considered that there were no grounds for sending up the proposal to the review committee in respect of that officer. We cannot presume that a Head of Department had not done his duty. In fact we are directed to assume by law that official action shall be deemed to have been done unless the contrary is proved. We are therefore of opinion that if an officer's name who is due to attain the age of 50 years or has completed 25 years of service had not been sent to the review committee, it shall be presumed that there were no grounds for sending his name for consideration for compulsory retirement and that it is in those circumstances, the competent authority had not referred the matter to the review committee."

4. In this case, the first respondent completed 25 years of qualifying service in 1973 and that is not in dispute. No review was undertaken on the basis of completion of 25 years of qualifying service. He has completed 50 years of age on 8.1.1977 and as per paragraph 4 of the Government Order referred to above, his case should have been sent up for review before 1st July, 1976. However, the first respondent's case was referred to the Review Committee some time late in January, 1977. Therefore there is a clear violation of the time-limit prescribed in the said Government Order which has been held to be mandatory by the Full Bench. That the reference is belated has been admitted in the supplemental counter affidavit and the only stand taken therein by the appellants is that the belated reference of the first respondent's case for review will not vitiate the ultimate order passed by the first appellant compulsorily retiring him, as the recommendations of the Review Committee are only advisory in nature. Such a contention that the belated review will not vitiate the order of compulsory retirement cannot be accepted in view of the Full Bench decision referred to above. Hence the order of compulsory retirement passed against the first respondent cannot legally be sustained in view of the decision of the Full Bench of this Court. In this view, the ultimate conclusion of the learned single Judge that the order of compulsory retirement is illegal and is not valid has to be upheld but on a different ground. The result is, Writ Appeal No.189 of 1983 has to be dismissed and it is dismissed accordingly. There will be no order as to costs.

R.S. .... *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *S. Mohan and T.Sathiadev, JJ.*

*W.A.Nos. 561 and 562 of 1983 etc.
18th April, 1984.

C.V. Raman *Petitioner**

v.

The Management of Bank of India, Regional Office, Southern Region, represented by the Asst. General Manager, Madras and another *Respondents*

(A) Tamil Nadu Shops and Establishments Act (36 of 1947), section 2 (3), (6) - 'Establishment' and 'Commercial' - Definition of.

(B) Tamil Nadu Shops and Establishments Act (36 of 1947), sections 4 (1) (c) and 41 - Applicability of Act to Nationalised Banks and to the State Bank of India.

(C) Banking Companies Act (Acquisition and Transfer of Undertaking) Act (5 of 1970) and State Bank of India Act (23 of 1955)..

(D) Constitution of India (1950), Article 12 - "Control of Central Government" - Meaning of - Nationalised Banks whether would constitute "establishments".

(E) Words and Phrases - "Control" and "Under".

Held: The Shops Act will not apply to **Nationalised Banks** and to the State Bank of India. It cannot be gainsaid that the principle applicable to the determination of "an authority" under Article 12 of the Constitution of India, can bodily be imported in deciding the meaning of 'establishment, under the Government'. However, the line of reasoning, namely, the theory of deep and pervasive control must prevail to find out whether the statutory corporations are under the Central Government or functioning independently. It is not correct to state that the control of Government of India relates only to matters of policy as adumbrated under section 8 of Central Act V of 1970.

The difference in language between Article 12 of the Constitution which says 'an authority under the control of the Government' and section 4 (1) (c) of Shops Act which says an establishment 'under the Government of India' cannot be lost sight of. Therefore, it becomes imperative to ascertain the meaning of the word 'under'. *[Para. 70]*

If the Nationalised Bank is subject to the authority or control of the Government of India, which is the meaning of the word 'under' as seen above, the principle of deep and pervasive control may be applied in considering section 4 (1) (c) of the Shops Act. [*Para* 74]

The legislative intention with regard to the word 'under' will have to be gathered from the language and also from the context. It cannot but be interpreted as subject to the 'authority', 'rule' or 'control'. The control of the Government of India over the Nationalised Banks is enormous and therefore we have no hesitation in agreeing with the learned single Judge. *(Para* [illegible]

Cases referred to:

Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 S.C.C. 421 : (1975) Lab.I.C. 581 : (1975) 1 Lab.L.J. 399 : A.I.R. 1975 S.C. 1331; *Madras State Electricity Board v. Commr. of Labour*, (1960) 2 L.L.J. 357; *Madras State Electricity Board v. Commr. of Labour*, (1961) 1 M.L.J. 247 : 74 L.W. 175 : (1961) 1 L.L.J. 297; *Narayanaswami v. Krishnamurthi*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343; *Canara Bank v. The Appellate Authority*, (1981) K.L.T. 413 : 59 F.J.R. 92 : (1981) 2 L.L.J. 189 : (1981) Lab. I.C. 1043; *Corporation of City of Nagpur v. G.S.Narayanan Ayyar*, (1977) 2 L.L.J. 189; *Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 2 S.C.J. 1 : (1982) 1 S.C.C. 125 : A.I.R. 1982 S.C. 699; *Workmen, Karnataka P.F. Employees Union v. Addl. Industrial Tribunal*, (1983) Lab.I.C. 1523 : (1983) 2 L.L.J. 108; *Ramana Dayaram Shetti v. International Airport Authority of India*, (1979) 3 S.C.C. 489 : (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628; *Biharilal v. Roshanlal Dobray*, (1984) 1 S.C.C. 551 : A.I.R. 1984 S.C. 385; *Som Prakash v. Union of India*, (1981) 1 S.C.J. 458 : (1981) 1 Lab.L.J. 79 : A.I.R. 1981 S.C. 212; *Ajay Hasia v. Khalid Mujib*, (1981) 1 L.L.J. 103 : A.I.R. 1981 S.C. 487; *Warehousing Corpn. v. Tyagi*, (1970) 1 S.C.J. 790 : (1970) 1 L.L.J. 32 : (1970) 2 S.C.R. 250 : A.I.R. 1970 S.C. 1244; *Rajasthan State Electricity Board, Jaipur v. Mohanlal*, (1968) 1 S.C.J. 461 : (1968) 1 L.L.J. 257 : A.I.R. 1967 S.C. 1857; *H.E.M. Union v. State of Bihar*, (1969) 2 L.L.J. 549 : (1970) 1 S.C.J. 35 : (1969) 3 S.C.R. 995 : A.I.R. 1970 S.C. 82; *Lachhman Dass Agarwal v. The Punjab National Bank*, (1978) 52 F.J.R. 306 : 80 P.L.R. 72 : (1978) Lab.I.C. 423; *Sukhdev Ratilal Patel v. Chairman, Bank of Baroda*, (1977) 2 L.L.J. 409; *Miss. P.S. Geetha v. The Central Bank of Bombay*, (1978) Lab.I.C. 1271; *H.M.T.W.S. Union v. Hindustan Machine Tools Ltd.*, (1982) 1 L.L.J. 178; *Jacob v. State Bank of Travancore*, (1972) K.L.T. 914 : (1973) R.C.J. 168 : A.I.R. 1973 Ker. 51 (F.B.); *Krishna Prasad v. Union of India*, (1960) 2 L.L.J. 326 : A.I.R. 1960 Cal. 264; *Manohar v. Maratrao*, (1979) 2 S.C.J. 119 : (1979) 4 S.C.C. 93 : (1979) S.L.J. 403 : A.I.R. 1979 S.C. 1084; *Gurushanthappa v. Abdul Khuddas*, (1969) 2 S.C.J. 343 : A.I.R. 1969 S.C. 744; *Motisingh v. Bhivvadai*, A.I.R. 1968

Bom. 370; *Ramaiah v. State Bank of India*, (1963) 2 L.L.J. 304 : A.I.R. 1964 Mad. 335; *B.S. Mimhas v. India Satistical Institute*, (1979) I S.L.J. 217 : (1983) 4 S.C.C. 582 : (1984) Lab.I.C. 15 : (1984) 1 L.L.J. 67 : A.I.R. 1984 S.C. 363; *U.P. Warehousing Corporation v. Vijayanarain*, (1980) S.L.J. 204 : (1980) 3 S.C.C. 459 : (1980) 1 L.L.J. 222 : A.I.R. 1980 S.C. 840; *Pillai v. Indian Institute of Technology*, (1964) 2 L.L.J. 311; *Manoj Kanti Basu v. Bank of India*, (1977) 51 F.J.R. 419; *K.S. Murthy v. Syndicate Bank*, (1976) 2 L.L.J. 222; *Karunakaran Nair v. Authority under the Payment of Wages Act*, (1972) 1 L.L.J. 350; *Zila Parishad v. Shanti Devi*, A.I.R. 1965 All. 590; *Vithoba Babaji v. Sholapur Municipality*, A.I.R. 1947 Bom. 241; *P.K. Ramachandra Iyer v. Union of India*, (1984) 2 S.C.C. 141 : (1984) Lab.I.C. 301 : (1984) 1 L.L.J. 314 : A.I.R. 1984 S.C. 541; *Ramaiah v. State Bank of India*, (1968) 2 Lab.L.J. 424; *Sukhdev Ratilal v. Chairman, Bank of Baroda*, (1976) 2 Serv.L.R. 144; *Guru Gobinda Basu v. Sankari Prasad Ghesal*, (1964) 1 S.C.J. 259 : (1964) I Comp.L.J. 87 : 33 Comp. Cas. 1132 : (1964) 4 S.C.R. 311 : A.I.R. 1964 S.C.254.

N.G.R. Prasad, for *Row and Reddy*, for Appellants.

A.T.S. Gopalan, for Petitioner.

A.Ramachandran, for *Row and Reddy*, for Respondents 2 to 6 in W.P.No.1550 of 1981.

P.V. Marthandan, for 2nd Respondent in W.P.Nos. 11029 of 1981 and 9563 of 1983.

S. Pandurangan, for 2nd Respondent in W.P.No. 1730 of 1984.

The Government Pleader, for Respondents.

The Order of the Court was made by

MOHAN, J.:- An important question arising in this batch of cases is, whether the Tamil Nadu Shops and Establishments Act, 1947 (hereinafter referred to as the Shops Act) is applicable to the Nationalised Banks and to the State Bank of India.

2. We would first note the facts relating to W.A.Nos. 561 and 562 of 1983. They arise out of W.P.Nos.2013 and 2014 of 1979. W.P.No.2013 of 1979 is for *mandamus* to direct the first respondent to dispose of the preliminary objection raised by the Management of Bank of India, Regional Office, Southern Region, represented by the Assistant General Manager, Madras, in regard to the maintainability of T.S.E. Case No. 49 of 1975 on the file of the Additional Commissioner for Workmen's Compensation, II, Madras, in the appeal preferred by the employee, C.V.Raman under section 41 of the Act. W.P.No.2014 of 1979 is for prohibition to prohibit the Additional Commissioner from proceeding to take up for disposal T.S.E.Case No.49 of 1975.

3. The employee, C.V.Raman, the appellant in W.A.Nos. 561 and 562 of 1983, was working in the Bank of India. His services came to be terminated by the said Bank by an order, dated 17th April, 1975. For the purpose of the issue involved in these appeals, it is not necessary to go into the circumstances leading to the dismissal. However, it is sufficient to state that the said dismissal was by way of disciplinary action for certain charges against him. The dismissal order was preceded by a domestic enquiry.

4. Aggrieved by the dismissal, he preferred an appeal under section 41 (2) of the Shops Act. That appeal was taken up on file and numbered as T.S.E.No.49 of 1975 on the file of Additional Commissioner for Workmen's Compensation, II, Madras. On receipt of the appeal memo, the Management of Bank of India in its written statement raised a preliminary objection that the appeal itself was not maintainable, since the provisions of the Shops Act were inapplicable to the Bank, which is an establishment under the Central Government. Therefore, by reason of section 4 (1) (c) of the Shops Act, it was exempt from the purview of the said Act. It was contended that since the matter went to the root of jurisdiction, it could be taken as a preliminary issue and decided before the merits of the appeal were gone into. By an order dated 7th April, 1979, the Additional Commissioner for Workmen's Compensation,

refused to pass an order on the preliminary objection. He directed that the appeal would be heard both on the preliminary objection and on merits. Accordingly, he posted the appeal on 19th May, 1979. It was at that stage, the above two writ petitions were filed.

5. In the affidavit filed in support of the writ petitions, the only point that was raised, was that in view of section 4 (1) (c) of the Shops Act, the Bank would fall outside the purview of the Act. Section 2 (3) of the Act defines 'commercial establishment' as including a Bank. Section 2 (6) defines 'establishment' among other things 'commercial establishment'. As the Bank is an establishment under the Central Government by virtue of section 4 (1) (c) of the Shops Act, it would fall completely outside the Act. No employee of the Bank can have recourse to the appellate authority constituted under section 51 of the Act. It was submitted that this contention was fully supported by the provisions of the Banking Companies (Acquisition of Undertakings) Act, 1970 in and by which several Banks were nationalised including the Bank of India, the first respondent in the above appeals. The employee contended that the Bank of India was not an establishment under the Government of India and therefore, the appellate authority constituted under section 41 of the Shops Act will have every jurisdiction to try the appeal. The matter came up before our learned brother, Ramanujam, J. The learned Judge, on an analysis of the provisions of the Shops Act and on going through the important provisions of Banking Companies (Acquisition of Undertakings) Act, 1970 hereinafter referred to as the Nationalisation Act, came to the conclusion that the Bank of India was an establishment under the Government of India, and therefore section 4 (1)(c) of the Shops Act would apply, which means the Bank will fall out of the purview of the Shops Act. The learned Judge was of the view that whatever considerations applied in determining whether the Bank is an 'authority' within the meaning of Article 12 of the Constitution of India, those considerations ought to apply in deciding whether an establishment is one under the Government of India or not. He relied principally on *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 Lab.L.J. 399 : (1975) 1 S.C.C. 421 : (1975) Lab.I.C. 881 : A.I.R. 1975 S.C. 1331. The learned Judge was of the view that the ruling of this Court reported in *Madras State Electricity Board v. Commissioner of Labour*, (1960) 2 L.L.J. 357 and *Madras State Electricity Board v. Commissioner of Labour*, (1961) 1 L.L.J. 297 : (1961) 1 M.L.J. 247 : 74 L.W. 175 and *Narayanaswami v. Krishnamurthi*. (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343, cannot be said to lay down the correct law after the decision of the Supreme Court in *Sukhdev Singh's case*, (1975) Lab. *I.C. 881 : (1975) 1 S.C.C. 421 : A.I.R. 1975* S.C. 1331. On an analysis of the decision of the Supreme Court, the learned Judge held that two propositions would clearly emerge:-

"(1) A statutory corporation, such as the Bank, whose peculiar features can be gathered from the Nationalisation Act, can be taken to be owned by the Central Government or at any rate it would be an 'agency' or 'instrumentality' of the Central Government.

(2) Even if the statutory Corporation belongs to the Central Government or it is owned by the Central Government, or it is an agency or instrumentality of the Central Government, still having regard to its separate legal status, having a legal personality of its own with power to acquire, hold and dispose of properties, the theory of separate legal enquiry with power to acquire, hold and dispose of the property of a statutory corporation is relevant only for the purpose of determining whether the assets and liabilities of the Corporation can be taken to be the assets and liabilities of the Government."

Thus, the learned Judge allowed the writ petition.

6. The petitioner in W.P.No.1550 of 1981 is the State Bank of India, Madras. It is aggrieved by the order of the Commissioner of Labour, Madras, dated 14th

February, 1981. The respondents in W.P.No. 1550 of 1981, filed an application under section 51 of Shops Act. In that application, the Commissioner of Labour was requested to render a decision that all the provisions of Tamil Nadu Shops and Establishments Act of 1947 would apply to them as persons employed in the State Bank of India. It was also urged that the exemption granted by the Government of Tamil Nadu to persons holding position of Management in G.O.Ms.No.512, Labour, dated 10th April, 1970 would not apply to them. Each one of the respondents filed separate applications praying for the same relief. Therefore, they came to be dealt with together.

7. A preliminary objection was raised on behalf of the writ petitioner that the State Bank of India would fall under the exemption clause contained under section 4 (1) (c) of the Shops Act and therefore, the Act would not apply to the State Bank of India. Another objection was raised that the work of the respondents herein involved travelling and therefore, Chapter III of the said Act, which deals with hours of work, holdings and payment of overtime wages would not apply to them. On the second of the objections, the Commissioner held that the respondents herein were not persons, whose rank involved travelling, as the travelling, from one place to another occasionally and under the specific orders of the employer to do work outside the branch, would not convert an office job into one that involves travelling. On the first of the objections, namely, the applicability of section 4 (1) (c) of the Shops Act to State Bank of India, after analysis of the relevant provisions of the Act, and on a reference to relevant case law, he rejected the contention that the State Bank would fall under section 4 (1) (c) of the Shops Act. In the result, he held that all the provisions of the Tamil Nadu Shops and Establishments Act, 1947 would apply to the respondents herein, who belonged to the Junior Management cadre of the State Bank of India and they are not occupying the posts of Branch Manager or field officers. It is under these circumstances, that the writ petition has come to be preferred for *certiorari* to quash the order of the Labour Commissioner, Madras.

8. *W.P.No.11029 of 1981:-* The State Bank of India is the petitioner herein. This writ petition is against the order of the Deputy Commissioner of Labour II, Madras. The respondent started his carreer as a clerk in the Imperial Bank of India way back in 1955. By dint of his hard work, he rose to the position of an Officer Grade II in 1965. When he was Branch Manager at Tirupattur (Ramanathapuram District) it was brought to the notice of the writ petitioner Bank that during his tenure as Field Officer in Sattur branch and also as Branch Manager at Tirupattur branch, he committed various acts of misconduct, which are prejudicial to the interests of the Bank.'

9. By a charge sheet dated 24th November, 1978, sixteen charges were levelled. He submitted his explanation. His explanation was found not satisfactory. Hence the Bank decided to hold an enquiry into the charges against the second respondent. The Enquiry Officer gave his findings, dated 9th April, 1979 holding that the charges were proved. The Disciplinary Authority considered the findings of the Enquiry Officer and imposed the penalty of removal from service. He passed the orders on 10th September, 1979 removing him from service.

10. Against the said order of removal, he preferred an appeal on 12th October, 1979 to the Members of the Local Board of the Bank. At its meeting held on 22nd November, 1979, the Local Board of the Bank considered the appeal. It resolved that there was no justification to interfere with the findings recorded and the punishment imposed by the Disciplinary Authority. Accordingly the appeal was dismissed. Thereupon, he preferred an appeal under section 41 (2) of the Tamil Nadu Shops and Establishments Act. That was numbered as T.S.E.Case No.60 of 1979. It was urged that in view of the exemption clause contained under section 4 (1) (c) of the Act, the provisions of the Shops Act would be inapplicable and therefore, the appeal was incompetent. The appeal of the second respondent was allowed by the order, 14th July, 1981.

Hence, the present writ petition.

11. *W.P.No. 9563 of 1983:-* Here again, it is State Bank of India that is the petitioner. The facts are as under: The second respondent was working as Assistant Security Officer in the petitioner bank. During June, 1971 and October, 1971, he was stated to have committed certain serious irregularities, in the matter of claiming expenses, alleged to have been incurred on account of the visit of V.I.Ps. Therefore by a chargesheet dated 4th December, 1972, 15 charges were levelled against him. The second respondent was governed by the State Bank of India (Officers and Accountants) Service Rules. Though under the Service Rules applicable to him, an enquiry was not contemplated having regard to the facts, the Bank decided to hold a full-fledged enquiry. Accordingly a domestic enquiry was held. The Enquiry Officer gave his findings, holding that all the charges, except a portion of one charge, were proved. After the receipt of the finding, the second respondent was asked to appear before the Chief General Manager for a personal hearing. After this, by letter dated 12th May, 1976, the second respondent was informed that it was proposed to inflict the punishment of dismissal. He was called upon to show cause why the said punishment should not be inflicted. He made a representation on 15th June, 1976. After considering his representation, the Local Board of the writ petitioner Bank at its meeting held on 7th July, 1976, dismissed him from Bank service. Aggrieved by that order, he preferred an appeal under section 41 (2) of the Shops Act. The said appeal was numbered as T.S.E.No.4 of 1979. Though, originally the matter was heard by Deputy Commissioner, Labour II, he did not pass any orders. Subsequently the first respondent was notified as the Appellate Authority and the appeal of the second respondent came to be transferred to the first respondent. In the course of hearing before him, it was urged that the petitioner bank is an establishment under the Central Government. Therefore, by virtue of section 4 (1) (c) of the Tamil Nadu Shops and Establishments Act, the said Act would not apply to the second respondent. The further objection raised was that the second respondent was holding a position of Management and governed by service rules and therefore he could not invoke the provisions of the said Act. On a consideration of the matter, the first respondent overruled both the objections and set aside the order of the petitioner bank by its order dated 11th August, 1983. It is to quash the same that this writ petition has come to be preferred.

12. *W.A.No. 1730 of 1984:-* In this case, the Central Bank of India, Madras is the petitioner. The writ petition is filed to quash the order passed in T.S.E.No.23 of 1983, setting aside the order of dismissal passed by the writ petitioner against the second respondent by way of punitive action. Here again the jurisdictional issue and the applicability of section 4 (1) (c) of the Shops Act to the writ petitioner bank is involved. Whatever decision is rendered in W.A.Nos. 561 and 562 of 1983 will squarely govern this case since this is one of the Nationalised Banks unlike the State Bank of India. Therefore, it is not necessary to go into the details relating to the facts.

13. Mr. N.G.R. Prasad, learned Counsel appearing for the appellant in W.A.Nos.561 and 565 of 1983, C.V.Raman an employee of Bank of India, submits as under: After referring to section 4 (1) (c) to the Shops Act, it is urged that the meaning of commercial establishment came to be decided in *Madras State Electricity Board v. Commissioner of Labour,* (1961) 1 L.L.J. 297 : (1961) I M.L.J. 247. In that case, the question arose whether the electricity department of the then Madras Electricity Board would fall under the definition of 'establishment under the Government'. The Court found that there was no direct relationship of master and servant between employees of those departments and the Electricity Board. To the same effect is the ruling reported in *Madras State Electricity Board v. Commissioner of Labour,* (1961) 1 L.L.J. 297 : (1961) 1 M.L.J. 247. In the *Canara Bank v. The Appellate Authority,* (1981) 2 L.L.J. 189 : (1981) Lab.I.C. 1043 : (1981) K.L.T. 413 : 59 F.J.R. 92, the Kerala High Court

considered the question whether the Canara Bank and Bank of India--two nationalised Banks, were establishments under the Central Government and as such would be exempt from the provisions of the Kerala Shops and Establishments Act, 1960. Under section 3 (1) (c) in that case, it was held, the control of the Government over the National Banks is limited only to matters of policy. The Corporation, as a separate legal entity, is entitled to acquire, hold and dispose of property. It is liable to income-tax. The expression 'establishment' used in section 3 cannot be equated with the undertaking. These Banks have their own staff pattern, their own conditions of service not connected with the Government or the services rules of the Government and are not establishments under the Central Government. The learned Counsel places strong reliance on this ruling and contends that the failure on the part of the learned single Judge to apply this ruling to the facts of this case has resulted in a wrong decision.

14. The next case relied on by the appellant is *Corporation of City of Nagpur v. G.S. Narayanan Ayyar and another*, (1977) 2 L.L.J. 189. That case arose under Bombay Shops and Establishments Act. It was held that the Bank of Baroda, which was a Nationalised Bank was not exempt from the provisions of the Shops and Establishments Act as being an establishment of the Central Government. That learned Counsel next cites the ruling in C.R.P.No.2632 of 1979. The decision in that case was rendered by one of us. It was held that the property belonging to a nationalised bank cannot be equated to the holdings of the Government of India.

15. As to what is the meaning of 'Government Company' can be gathered from the ruling of the Supreme Court in *Western Coalfields Ltd. v. Special Area Development Authority*, (1982) 2 S.C.J. 1 : (1982) 1 S.C.C. 125 : A.I.R. 1982 S.C. 697. In the light of that case, certainly the Nationalised Bank is not a Government Company.

16. In a case which arose before the Karnataka High Court which is reported in *Workmen, Karnataka P.F. Employees Union v. Addl. Industrial Tribunal and another*, (1983) 2 L.L.J. 108 : (1983) Lab.I.C. 1523, it was held that the activity of the Provident Fund Organisation is essentially non-Governmental. If that were the position with regard to an organisation, the case of the Nationalised Bank could be no better.

17. In *Ramana Dayaram Shetti v. International Airport Authority of India and others*, (1979) 3 S.C.C. 489 : (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628, the Supreme Court explained the meaning of 'agency' or 'instrumentality' for the purpose of Article 12 of the Constitution of India. Therefore, if those cases are applied, certainly the nationalised Banks cannot be held to be either 'agency' or 'instrumentality'.

18. In *Biharilal v. Roshanlal Dobray*, (1984) 1 S.C.C. 551 : A.I.R. 1984 S.C. 385, the Supreme Court held that the U.P. Education Committee was held to be an alter-ego, having regard to the control exercised by the Central Government. But here the position is entirely different. By a reading of Article 12 of the Constitution of India, it is clear that it makes reference to other authorities. It has no reference to institutions like the present bank.

19. The learned Counsel for the appellant draws our attention to sections 3 (4) and 4 of the Nationalisation Act. Both read together, according to him, would clearly establish the indisputable fact that the Nationalised Bank is an institution, having a separate entity. He also draws our attention to sections 7 and 11 of this Act and he contends that the fact that the Banking company is assessable to income-tax under section 11, is a point in favour of the employee to hold that the exemption provisions of the Shops Act, would not apply. The learned Judge, according to the learned Counsel for the appellant, erred in applying these cases to decide the meaning of an 'authority' under Article 12 of the Constitution of India to an 'establishment under the Government of India'. Certainly, it cannot be contended that any Nationa-

lised Bank is an authority subordinate to the Government of India. Otherwise, its power as a legal institution and as a legal person to acquire, hold and to dispose of property is rendered nugatory.

20. Mr. M.R.Narayanaswami, learned Counsel appearing for the Bank contends that the approach to this important legal question must be in the following manner. Section 2 (3) of the Shops Act defines 'commercial establishment'. In that is included 'a bank'. Section 2 (5) defines 'establishment' as such. This Act is of the year 1947. Before that there was only the Reserve Bank of India. That was later on taken over by the Government. It was only by the Reserve Bank Transfer to Public Ownership Act (Central Act 62 of 1948), which came into force on 1st January, 1949, the Government of India started exercising control over other banks. It is under this background that the exemption clause contained under section 4 has to be examined. Section 4 (1), clauses (l) and (b) exempt individuals, while section 4 (1) (c) exempts the establishments under the Government. In other words, the establishment as such is exempt, which is found to be under the Government of India. Once the institution, as a whole is exempt, it is irrelevant to find out whether there exists a relationship of master and servant between the Government of India and the Employees of the Bank. Therefore, the crucial test to be applied is whether the Nationalised Bank is 'an establishment' under the Government of India. To establish this proposition, he would mainly rely on the provisions of the Nationalisation Act. The learned Counsel for the Banks invites our attention to section 2 (d), which defines the corresponding provisions. Under section 3, the meaning of 'vesting' is dealt with. No doubt, section 3 (4) of the Act states a 'Nationalised Bank' 'the body corporate'. That cannot belittle a Nationalised Bank being under the Central Government. The vesting takes place under section 4. Under section 7, the location of the Head Office and the management must be as per the directions of the Central Government. Under section 8, the Banks are to be guided by the Central Government. Under section 10 (7), the profits of the banks are to be kept by the Central Government. Under section 10 (7), the profits of the banks are to be transferred to Central Government. Section 14 lays down that a custodian of a bank is a public servant within the meaning of the Indian Penal Code. Then again, there is a scheme framed under section 9 of this Act. That also lays down the measure of control by the Central Government over those banks. In *Sukhdev Singh* v. *Bhagathan*, (1975) 1 S.C.C. 421 : (1975) Lab.I.C. 881 : A.I.R. 1975 S.C. 1331, the Supreme Court formulated the test for holding the Life Insurance Corporation of India, the Oil and Natural Gas Commission as authority. The learned Counsel would draw our attention to the judgment of Justice Mathew in paragraph 109 and the judgment of Chief Justice Ray in paragraphs 39, 44 and 50. In paragraph 50 of the judgment, according to him, the Life Insurance Corporation of India was held to be an authority within Article 12 of the Constitution of India. A close analysis of the Life Insurance Act of 1956 and the Nationalisation Act of 1970, leaves no room for doubt that the Nationalised Bank is an establishment under the Government of India. It is important to note, according to the learned Counsel, paragraph 67 of the said judgment where it has been laid down that the employees of these Corporations or Commissions were not the employees of the Union or the State. They could not be elevated to that status and therefore, Article 311 was held inapplicable to them. Those tests, to hold the institutions like the Life Insurance Corporation of India as an authority under Article 12 of the Constitution of India, should equally apply to Nationalised Banks, in view of the great similarity between Life Insurance Corporation of India Act and the Nationalisation Act. The learned single Judge was right in approaching the issue involved in this case in that way.

21. The same line of reasoning was adopted by the Supreme Court in *Som Prakash v. Union of India*, (1981) 1 S.C.J. 458 : (1981) 1 Lab.L.J. 79 : A.I.R. 1981 S.C. 212. Likewise in *Ajay Hosia v. Khalid Mujib*, (1981) 1 L.L.J. 103 : A.I.R. 1981 S.C. 487,

it was held that even a Society registered under the Societies Registration Act was an authority under Article 12 of the Constitution of India. At page 493, the test to be adopted was stated as follows:-

"The true owner is the State, the real operator is the State and the effective controllerate is the State and accountability for its actions to the community and the Parliament is of the State."

Those decisions are not only sound, but are relevant to the case on hand.

22. In *Warehousing Corpn. v. Tyagi*, (1970) 1 S.C.J. 790 : (1970) 2 S.C.R. 250 : (1970) 1 L.L.J. 32 : A.I.R. 1970 S.C. 1244, the Agricultural Produce (Development and Warehousing) Corporation, when it dismissed an employee without following the procedure laid down in its Regulation 16 (3), it was held that no declaration to enforce a contract of personal service will normally be granted. The remedy of such a person would be to file a suit for damages. If, therefore, according to him, a Nationalised Bank falls outside the purview of this Act, no appeal could be entertained by the authority constituted under section 14 of the Shops Act.

23. In *Rajasthan State Electricity Board, Jaipur v. Mohanlal and others*, (1968) 1 S.C.J. 461 : (1968) 1 L.L.J. 257 : A.I.R. 1967 S.C. 1857, the Rajasthan Electricity Board was held to be an authority under Article 12 of the Constitution of India. In *Dayaram Shetty v. The International Airport Authority of India*, (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628, in paragraph 13, at page 1638, how the Government could act through its agencies has been explained. The same principle should be applicable to the facts of this case. That case also explained in the case in *H.E.M.Union v. State of Bihar*, (1969) 2 L.L.J. 549 : A.I.R. 1970 S.C. 82, in paragraph 29 of its judgment. The question in that case was whether the words 'under the authority' could mean 'pursuant to the authority'. Therefore whether the Heavy Engineering Corporation Ltd., can be said to be carrying on the business to the authority of the Central Government. The answer to this question was 'no' because the Corporation was carrying on business by virtue of the authority derived from its Memorandum of Articles of Association and not by reason of any authority granted by the Central Government. The learned Counsel states that having regard to these decisions, there could be an establishment under the control of the Government, even though it is a statutory Corporation. He states further that the tests applied to decide an authority under Article 12 have also been applied to Nationalised Bank as seen from the decision in *Lachman Dass Agarwal v. The Punjab National Bank*, (1978) 52 F.J.R. 306 : 80 P.L.R. 72 : (1978) Lab.I.C. 423, with regard to Punjab Nationalised Bank. There the scope of section 11 of the Nationalisation Act has also been discussed in paragraph 10 at page 428. He also draws our attention to the other cases reported in *Sukudev Ratilal Patel v. Chairman, Bank of Baroda and another*, (1977) 2 L.L.J. 409 and *Miss P.S.Geetha v. The Central Bank of Bombay*, (1978) Lab.I.C. 1271. He refers to the Third New Webster's Dictionary and Shorter Oxford English Dictionary in regard to the word 'under'.

24. In *H.M.T.W.S. Union v. Hindustan Machine Tools Ltd.*, (1982) 1 L.L.J. 178, the words 'under the control of Government of India', came up for discussion under the Industrial Establishments (National Festival and other Holidays) Act. According to him section 11 (c) of the Andhra Pradesh Factories Act corresponds to section 4 (1)(c) of the Shops Act and the ratio of the judgment would therefore apply. The learned Counsel for the appellant, after providing us with the corresponding provisions of the Shops and Establishments Act of the various States, submits that in *Corporation of City of Nagpur v. G.S.Narayana Ayyar and others*, (1977) 2 L.L.J. 189, the wording of section 4 of the Bombay Shops and Establishments Act has been dealt with. There is a vital distinction between the word 'of' and 'under' Central Government. Therefore, that decision cannot be of any use.

25. The sheet anchor of the appellant's argument proceeds from the decision in

Canara Bank and others v. *Appellate Authority*, (1981) 2 L.L.J. 189 : (1981) K.L.T. 413. That case bristles with incorrectness. When the word 'establishment' has been defined under the Kerala Shops and Establishments Act there is nothing to go to the dictionary meaning. In paragraph 7 of that judgment, the word 'under' has been read as 'of'. In fact, there is an earlier Full Bench judgment of the very same High Court as seen from *Jacob* v. *State Bank of Travancore*, (1972) K.L.T. 914 : (1973) R.C.J. 168 : A.I.R. 1973 Ker. 51 (F.B.), where, under section 3 of Kerala Land Reforms Act, the meaning of 'Corporation owned or controlled by the State, came to be laid down holding that the State Bank of Travancore, is a corporation owned or controlled by the State. This Full Bench judgment has not been noted at all in this ruling.

26. The learned Counsel for the appellant invites our attention to Bernard Schewartz's 'Legal Control of Government' 1972 Edn. pages 39 and 40, as to Nationalisation. He also cites a passage in Wade's Administrative Law, page 139 dealing with public Corporation. He refers to Black's Law Dictionary, V Edn. at page 924, wherein the word 'nationalisation' is dealt with as against the word 'de-nationalisation' at page 320. The learned single Judge was correct in his approach with regard to the appreciation of the Full Bench of the Kerala High Court.

27. In *Biharilal* v. *Roshanlal*, (1984) 1 S.C.C. 551 : A.I.R. 1984 S.C. 385, having regard to the control exercised by the Central Government, the U.P. Education Committee was held to be alter-ego. This case does not help in deciding the matter to issue.

28. No doubt, in *Madras State Electricity Board* v. *Commissioner of Labour*, (1960) 2 L.L.J. 357, it was the clerical department of the Industries undertaking, namely, the Madras Electricity Board, which is included under section 2 (12) (iii) of the Shops Act. Whether that would be exempt under section 4 (1) (c) was the point to be considered. Therefore, it was not the entire establishment as such, which came up for consideration. That decision does not apply to the facts of the present case. Therefore, the theory of master and servant relationship existing between the Government and the employees, need not detain us.

29. Originally, Banking Companies were governed by Part X-A of the Companies Act, 1930. In 1949, the Banking Regulation Act was enacted. Therefore Part X-A was repeated. Under the Banking Regulation Act, the Reserve Bank exercised several controls. By Nationalisation Act (Central Act V of 1970), if a change was brought about in the structure of the Bank itself, can it still be said that Shops Act, 1947 would apply? This should be the approach. Therefore it is futile on the part of the appellant to contend that the Government has control over the Nationalised Banks.

30. Mr.N.G.R. Prasad, learned Counsel for the appellant submits that section 4 (1) (c) when it talks of an establishment under the Government, it must be construed as an equal to a department of the Government. It must be utterly dependent on government of India in the matter on the day to day administration. An establishment 'under the Government' is different from an establishment 'under the control of Government.' He requests us to note the distinctive phraseology used in Article 12 and Article 58 (2) of the Constitution of India, and it is the same interpretation that was placed in *Narayanaswami* v. *Krishnamurthy*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343. That was followed in *Krishna Prasad* v. *Union of India*, (1960) 2 L.L.J. 326 : A.I.R. 1960 Cal. 264 and *Madras State Electricity Board* v. *Commissioner of Labour*, (1961) 1 L.L.J. 297 : (1961) 1 M.L.J. 247. All these cases held that 'under the Government' means 'a department of the Government'. Those decisions should be applied to these cases. Strong reliance is placed on the decision in *Narayanaswami* v. *Krishnamurthi*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343, particularly the passage occurring from paragraph 29 onwards. As a matter of fact, the ruling in *Narayanaswami* v. *Krishnamurthi*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343 was noted in *Manohar* v. *Marotrao*, (1979) 2 S.C.J. 119 : (1979) 4 S.C.C. 93 : (1979) S.L.J. 403 : A.I.R. 1979 S.C. 1084. The learned Counsel also cites Seervai's Consti-

tution of India, 3rd Edn., Volume I, page 224, paragraphs 7.82 and also Seervai's Constitution of India, II Edn., Volume 2, page 1155. He also draws our attention to the corresponding provisions of the Shops and Establishments Act in the various States, like Kerala, Karnataka, Andhra Pradesh, Madhya Pradesh, Punjab and Bombay. The specific mention of Reserve Bank in section 4(1)(c) is a relevant point, according to the appellant's Counsel. If really the intention was to exempt the banking establishments from the purview of the Act, there is no justification for mentioning the Reserve Bank of India alone.

31. Further citations on behalf of the appellant are *Warehousing Corpn. v. Tyagi*, (1970) 1 L.L.J. 32 : A.I.R. 1970 S.C. 1244, particularly paragraph 8; *H.E.M. Union v. State of Bihar*, (1969) 2 L.L.J. 549 : A.I.R. 1970 S.C. 82, paragraph 4 at page 85; *Gurushanthappa v. Abdul Khuddas*, (1969) 2 S.C.J. 343 : A.I.R. 1969 S.C. 744, at page 749, paragraph 10. After citing the decision in *Motisingh v. Bhivvadai*, A.I.R. 1968 Bom. 370 at page 374, paragraph 15, it is urged that the word 'under' means 'subordinate to the Government'. It is this interpretation which has to be placed in this case. So construed, it cannot be held that the Nationalised Banks are subordinates of the Government, having regard to the fact that there is no absolute control over their day to day affairs.

32. Acting under the power conferred by Central Act V of 1970, the Indian Overseas Bank has framed 'Discipline and Appeal Regulations'. They do not provide for an appeal to Central Government. That is one of the tests laid down in *Bihari Lal v. Roshan Lal*, (1984) 1 S.C.C. 551 : A.I.R. 1984 S.C. 385. The failure to provide for such an appeal to Central Government is again a point in his favour.

33. Mr. M.R.Narayanaswami, learned Counsel for the State Bank of India, petitioner in other writ petitions, draws our attention to the following important provisions of the State Bank of India Act of 1965.

'Sec. 3 'Establishment of the State Bank;

'Section 4 particularly the proviso dealing with authorised capital;

'Section 6 dealing with transfer of assets and liabilities from Imperial Bank to the State Bank."

It is also stated therein that all the shares in the capital of the Imperial Bank shall be transferred to and vested with the Reserve Bank.

'Section 10(1) deals with transferability of shares."

However, in sub-section (2) it is clearly stated:-

'Nothing in sub-section (1) shall entitle the Reserve Bank to sell its shares in the State Bank if it results in reducing the shares of the Reserve Bank to less than 55% of the issued capital."

Section 16 (1) states, the Central Office of the State Bank shall be at Bombay.

Section 16 (2) talks of the Bank having local head offices in Bombay, Calcutta and Madras.

Section 18 according to the learned Counsel is an important section, which has a bearing. That section states as follows:-

"*Section 18 (1)*:- In the discharge of its functions, the State Bank shall be guided by such directions in matters and policies involving public interest as the Central Government may in consultation with the Governor of the Reserve Bank and the Chairman to it.

(2) All directions given by the Central Government shall be given through the Reserve Bank. If any question arises, whether the direction relates to a matter of policy of public interest, the decision of the Central Government is final."

34. This shows the nature of appeal. Section 19 deals with the composition of Central Board; the power of appointment of Directors under clauses (a), (b), (c-a) and (c-b); clause (d) contemplates direct-

from various sources. All these Directors are appointed only by Central Government. In this connection, it is worthwhile to note Part XA of the Banking Regulation Act, 1949.

"Section 20 talks of the term of office of the Chairman. That is to be fixed by the Central Government. Sub-section (1-A) deals with termination of office by Central Government. Section 21 in clause (c) deals with the nomination of six members of a Local Board by Central Government. Section 24 deals with removal from office of Directors by the Central Government. Section 25 states even casual vacancies are to be filled by Central Government. Section 27 (2) deals with 'Salary of Chairman."

Here again it is the Central Government which determines the same. Likewise section 29 (2) deals with the fixation of salary of the Vice Chairman.

Chapter VI of the Act concerns with the business of the State Bank of India.

Under section 35, it is stated thus:-

"State Bank may acquire the business of other Banks with the sanction of the Central Government."

Under section 37, it is stated thus:-

"*Reserve Fund:* State Bank shall establish a reserve fund consisting of the amount held in the reserve fund of the Imperial Bank transferred to the State Bank and such further sums as may be transferred to it by State Bank out of its annual nett profits before declaring a dividend."

35. Sections 40, 49 and 50 also are relevant. These various provisions suggest immense or extensive control by the Central Government. The learned Counsel cites the decision in *Ramaiah v. State Bank of India,* (1963) 2 L.L.J. 304 : A.I.R. 1964 Mad. 335, in this connection and also the decision in *Som Prakash v. Union of India,* (1981) 1 Lab.L.J. 79 : A.I.R. 1981 S.C. 212.

36. In *B.S.Minhas v. India Statistical Institute,* (1984) Lab.I.C. 15 : (1983) 4 S.C.C. 582 : (1984) 1 S.L.J. 217 : (1984) 1 L.L.J. 67 : A.I.R. 1984 S.C. 363, when the Supreme Court held that the 'Statistical Institute of India was an 'authority' under Article 12 of the Constitution in paragraph 20 of its judgment at page 369 had applied the test of deep and pervasive control of Government of India. It is that test, which will be important. If, therefore, on an analysis, the Court comes to the conclusion there is a deep and pervasive control by Government of India over the State Bank, certainly the Bank would claim exemption under section 4 (1) (c) of the Shops Act.

37. Mr. Gopinath learned Counsel, appearing for the second respondent, submits that the inclusion of 'bank' under section 2 (3) of the Shops and Establishments Act, is significant. Section 42 of the Reserve Bank of India Act gives power to the said Bank to exercise control over the banks. The Reserve Bank of India is a Government Bank. If the argument of the petitioner-State Bank of India is accepted, all banks will go out of the Shops and Establishments Act. Such an interpretation is not warranted at all in this case.

38. State Bank of India is a body corporate. Its shares are freely transferable. Among the Board of Directors, one of them can be from public. On a reading of the entire State Bank of India Act, 1955, it is clear that except for a capital structure and a policy control by Government, there is no other control. The learned Counsel draws our attention to the decision reported in *Sukhdev's case,* (1975) 1 S.C.C. 421 : (1975) Lab.I.C. 881 : A.I.R. 1975 S.C. 1331.

39. It has been held in *R.D. Shetty v. The International Airport Authority,* (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628, that financial assistance is one of the tests. That test is helpful to the instant case. He also cites the decision in *U.P. Warehousing Corporation v. Vijayanarain,* (1980) 1 L.L.J. 222 : (1980) S.L.J. 204 : (1980) 3 S.C.C. 459 : A.I.R. 1980 S.C. 840 and contends that the interpretation placed

by the petitioner cannot be accepted.

40. According to the learned Counsel for the second respondent in W.P.No.11029 of 1981, unless the control by the Government of India is full and complete, it is not possible to say that the State Bank of India is under the control of Government. In law, if there is accountability even to one shareholder, it would mean that the Bank is not under the control of the Government. To support this argument, he makes a reference to Ramaiya's Company Law, page 257, paragraph 5.38. If really the Directors are in fiduciary capacity shareholders, their appointments by Government are immaterial. In this connection, the learned Counsel referred to Ramaiya's Company Law--Commentary on section 291 of Companies Act (at page 622 of the latest edition).

41. Mr. A.Ramachandran, learned Counsel for the contesting respondents in W.P.No. 1550 of 1981, states that the existence of master and servant relationship, which is one of the important tests to be adopted in the case has been correctly held to be applicable in *Madras State Electricity Board v. Commissioner of Labour,* (1960) 2 L.L.J. 357. If really, section 4 (1) (c) of the Shops Act, when it was amended, omitted railways, and retained Reserve Bank of India, that is a matter for consideration. Then again, the Government of Tamil Nadu itself granted exemption on the assumption that the Act is applicable. Therefore, if the Act has been so understood, there is no justification to hold to the contrary. This apart, section 4 (1) (c) of the Shops Act neither uses the word 'instrumentality' nor 'agency'.

42. Part IV of the Constitution, when it talks of 'State' it means 'sovereign power'. The Government of India has no ownership of the State Bank of India. It is thus argued that the State Bank of India will not fall within the purview of exemption under section 4 (1) (c) of the Shops Act.

43. In reply Mr. M.R.Narayanaswami, learned Counsel for the State Bank of India, again draws our attention to the decision in *Pillai v. Indian Institute of Technology,* (1964) 2 L.L.J. 311 at 316 and also to *Ramaiah v. State Bank of India,* (1968) 2 L.L.J. 424. On the strength of these two cases, it could be held that there could be an employment in a public Corporation. Such an employment would be 'public employment' not being governed by Article 311 of the Constitution. In such a case, an endeavour must be made to find out the proper and appropriate meaning of the word 'under' and apply to the situation. The word 'under' is not defined under the Shops Act. The word 'under' occurring in section 4 (1)(c) of the Shops Act must be construed in such a way as to be harmonious with other provisions of the Act.

44. The reasoning which compels the Nationalised Banks to hold that they are under the Government of India, must be applied to the State Bank as well. In regard to the State Bank the degree of control could be less. Yet, there is substantial control though there is some autonomy. The election cases do not have any bearings in determining the word 'under' since the status of the establishment alone was in question in those cases.

45. We will consider the position of (1) the Nationalised Bank and (2) the State Bank of India, in the light of section 4 (1) (c) of the Shops Act. For that purpose, it is necessary to provide the legal backdrop. The Tamil Nadu Shops and Establishments Act as stated above, briefly referred to as the Shops Act, was enacted in the year 1947. It is an Act to provide for the regulation of conditions of work in the shops, commercial shops, restaurants, theatres and other shops and for certain other purposes. Though the Weekly Holidays Act of 1942, Central Act 18 of 1942, had been brought into force in this State from 1st January, 1947, it was limited in scope, in that it provided only for the grant of holidays and did not contain provisions for various other matters, such as, hours work, payment of wages, health and safety. Therefore, a comprehensive measure was considered necessary to regulate these matters on the lines of similar enactments in force in other States.

46. The meaning of 'Commercial establishment' can be gathered from section 2 (3). That reads as follows:-

"2(3). 'Commercial establishment' means an establishment which is not a shop, but, which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking which is an Insurance Company, joint stock company, bank, broker's office or exchange and includes such other establishment as the State Government may by notification declare to be commercial establishment for the purpose of this Act."

It requires carefully to be noted that the Bank is also included under the definition. Therefore, normally any Bank would fall under this Act, since business is carried on by the Bank.

47. The word 'establishment' has been defined under section 2 (6) of the Act. That is as follows:-

"2(6) 'establishment' means a shop, commercial establishment, theatre or any place of public amusement or entertainment and includes each establishment as the Government may, by notification, declare to be an establishment for the purposes of this Act."

48. The exemption clause, which is vital is contained under section 4 (1). Clause (c) is relevant. That is extracted below:-

"4(1) Nothing contained in this Act shall apply to (a)......(b)......

(c) establishments under the Central and State Governments, local authorities, the Reserve Bank of India, the Federal Railway authority, a railway administration operating a federal railway, and cantonment authorities;"

Two striking features of this exemption clause are:-

"(1) The specific mention of the Reserve Bank of India; and
(2) the omission of the words 'the Federal railway authority."

The argument proceeds that in as much as under the definition of 'commercial establishment' bank has come to be specifically included and in the exemption clause, the Reserve Bank of India alone is mentioned, it is impossible to contend that the Nationalised Bank, much less the State Bank of India would fall under the exemption clause. The correctness of this, in juxtaposition to the argument 'establishment under the Central Government', which is relevant forms the crux of the question in this case.

49. To find out whether a Nationalised Bank will fall under the exemption clause, it is necessary on our part to make a reference to the Banking Companies (Acquisition and Transfer of Undertakings) Act of 1970 (Central Act V of 1970). Section 2 (d) defines--

"Corresponding New Bank in relation to an existing Bank."

This means the Body Corporate specified against bank in column 2 of the First Schedule.

"Existing Bank" means--

'a Banking Company specified in column 1 of the First Schedule."

Section 3 deals with 'establishment of corresponding new banks and business thereof'. Section 4 states 'Undertaking of Existing Banks to vest in corresponding new banks'. The general effect of vesting is stated in section 5 as follows:-

"5. *General effect of vesting:-* (1) The undertaking of each existing bank shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable and immovable, cash balances, reserve funds, investments and all other rights and interests in, or arising out of, such property as were immediately before the commencement of this Act in the ownership, possession, power or control of the existing bank in relation to the undertaking, whether within or without India, and all books of accounts, registers,

records and all other documents of whatever nature relating thereto and shall also be deemed to include all borrowings, liabilities, and obligations of whatever kind then subsisting of the existing bank in relation to the undertaking.

(2) If, according to the laws of any country outside India, the provisions of this Act by themselves are not effective to transfer or vest any asset or liability situated in that country which forms part of the undertaking of an existing bank to, or in, the corresponding new bank, the affairs of the existing bank in relation to such asset or liability shall, on and from the commencement of this Act, stand entrusted to the chief executive officer for the time being, of the corresponding new Bank, and the chief executive officer may exercise all powers and do all such acts and things as may be exercised or done by the existing bank for the purpose of effectively transferring such assets and discharging such liabilities.

(3) The chief executive officer of the corresponding new bank shall, in exercise of the powers conferred on him by sub-section (2), take all such steps as may be required by the laws of any such country outside India for the purpose of effecting such transfer or vesting, as may either himself or through any person authorised by him in this behalf realise any asset and discharge any liability of the existing Bank.

(4) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect immediately before the commencement of this Act and to which the existing bank is a party or which are in favour of the existing bank shall be of as full force and effect against or in favour of the corresponding new Bank, and may be enforced or acted upon as fully and effectually as if in the place of the existing Bank, the corresponding new Bank had been a party thereto or as if they had been issued in favour of the corresponding new Bank.

(5) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any business of the undertaking which has been transferred under section 4 is pending by or against the existing bank, the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the undertaking of the existing bank or of anything contained in this Act, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the corresponding new Bank.

(6) Nothing in this Act shall be construed as applying to the assets, rights, powers, authorities, and privileges and property, movable and immovable, cash balances and investments in any country outside India (and other rights and interests in, or arising out of, such property) and borrowings, liabilities and obligations of whatever kind subsisting at the commencement of this Act, of any existing Bank operating in that country if, under the laws in force in that country, it is not permissible for a Banking company, owned or controlled by Government to carry on the business of banking there."

Section 6 deals with payment of compensation:-

"*Section 6 (1).* Every existing bank shall be given by the Central Government such compensation in respect of the transfer under section 4 to the corresponding new Bank of the undertaking of the existing bank as if specified against each bank in the second schedule."

Section 7. Head Office and management:-

(1) The Head Office of each corresponding new bank shall be at such place at the Central Government may by notification in the Official Gazette specify in this behalf and until such

places at which the head office of this bank is at the commencement of this Act located.

(2) The general superintendence, direction and management of the affair and business of a corresponding new bank shall vest in a Board of Directors which shall be entitled to exercise all such powers and do all such acts and things as the corresponding new bank is authorised to exercise and do.

(3) The Central Govenment shall in consultation with the Reserve Bank constitute the First Board of Directors of a corresponding new bank consisting of not more than 7 persons to be appointed by the Central Government and every director shall hold office until the Board of Directors of such corresponding new bank is constituted in accordance with the scheme made under section 9.

(4) Until the First Board of Directors is appointed by the Central Government under sub-section (3), the general superintendence, direction and management of the business of the corresponding new bank shall vest with the custodian.

(5) The Chairman of an existing bank shall be the custodian and if he declines, the Central Government may appoint any other person as the custodian.

(6) The custodian holds office during the pleasure of the Central Government.

Section 8. The corresponding new banks are to be guided by the directions of the Central Government in the discharge of its functions.

Section 9. Power of the Central Government to make a scheme to carry out the provisions of this Act.

Section 9(4). The Central Government may, after consultation with the Reserve Bank make a scheme to amend or vary any scheme make under sub-section (1).

Section 11. Corresponding new bank to be an Indian Company.

Section 14. **Every custodian shall be** deemed to be a public servant under the Indian Penal Code.

Section 18. Dissolution....No provision of law relating to winding up of Corporations shall apply to a new bank and no corresponding new bank shall be placed in liquidation save by order of the Central Government.

Section 19. Power to make regulations.

> "The Board of Directors of a corresponding new bank may, after consultation with the Reserve Bank and the provisions sanctioned by the Central Government, make regulations consistent with the provisions of this Act or any scheme made thereunder for the purpose of giving effect to the provisions of this Act."

50. Whether these new banks constituted under Central Act V of 1970 will fall within the scope of Article 12 of the Constitution of India, had come up for consideration in various cases. Before we deal with the cases, it is necessary to note as to what Article 12 states in extending Fundamental Rights *vis-a-vis* the authorities. That Article explains the defintion of 'State' which normally would mean 'sovereign power' as under:

> "*Article 12:* In this Part unless the context otherwise requires 'the State' includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

In *Manoj Kanti Basu v. Bank of India*, (1977) 51 F.J.R. 419. the Calcutta High Court held that the Bank of India would be an authority under Article 12 of the Constitution. A similar view was expressed in *K.S.Murthy v. Syndicate Bank*, (1976) 2 L.L.J. 222, by the Andhra Pradesh High Court, as regards Syndicate Bank. In *S.R. Patel v. Chairman, Bank of Baroda*, (1977) 2 L.L.J. 409, the Gujarat High Court took also the same view as regards Bank of Baroda. ***Lachman Dass v. Punjab National Bank*, (1977) Lab.I.C. 423 :**

52 F.J.R. 306, dealt with the Punjab National Bank. That is a decision of the Punjab High Court. In *Miss Geeta v. Central Bank of India, Bombay*, (1978) Lab. I.C. 1271, the Andhra High Court was concerned with the Central Bank of India. That Court came to the conclusion that such a bank would fall under the meaning of 'authority' under Article 12.

51. It may be stated at this stage in *Lachhman Dass v. Punjab National Bank*, (1978) Lab.I.C. 423 : 52 F.J.R. 306, in paragraphs 9 and 10 at pages 426 and 427, the following observations are found:-

"Applying the principles laid down in *Sukhdev Singh's case*, (1975) Lab.I.C. 881 : (1975) 1 S.C.C. 421 : A.I.R. 1975 S.C. 1331, there can be no doubt that Punjab National Bank is an 'authority' within the meaning of Article 12 of the Constitution. Punjab National Bank, as distinguished from the Punjab National Bank Limited, is not a company incorporated pursuant to the provisions of the Companies Act, but is a body created by statute, namely, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. It is wholly owned by the Central Government. The general supervision, direction and management of affairs and business of Punjab National Bank are vested in a Board of Directors appointed pursuant to a scheme made by the Central Government in consultation with the Reserve Bank of India. The Central Government has the power to modify the scheme from time to time. The Central Government is entitled to give directions to the Bank. The audit report is to be submitted to the Central Government and the Central Government is under an obligation to lay the report before both the Houses of Parliament. The profits of the Bank are required to be transferred to the Central Government. The officers and the employees of the Bank are granted immunity against losses and expenses incurred in connection with the discharge of their duties. It is clear from these provisions that the Government, instead of itself carrying on the business of banking as it certainly is entitled to, has chosen to carry on the business through the instrumentality of Punjab National Bank and other 'corresponding new Banks' created by the Statute and wholly owned by the Government. It is, 'State action' through bodies corporate, owned body and soul' (if such an expression may be used by the State). We have no doubt that the 'new corresponding Banks' are authorities within the meaning of Article 12 of the Constitution. Our view is supported by a decision of the Gujarat High Court in *Sukhdev Ratilal v. Chairman, Bank of Baroda*, (1976) 2 Serv. L.R. 144, and that of a learned single Judge of this Court in *Chamanlal Gupta v. Punjab National Bank*. (R.S.A. No.1797 of 1973).

"19. Shri D.S.Mehra, learned Counsel for the Bank argued that the Bank continued to be a company and relied upon section 11 of the Act, which provides that for the purposes of Income-tax Act, 1961 the Bank shall be deemed to be an Indian company. The submission of Shri Mehra is entirely without substance. Shri Mehra is confusing Punjab National Bank with the Punjab National Bank Limited. While the Punjab National Bank Limited was a company incorporated pursuant to the provisions of the Indian Companies Act, Punjab National Bank, the corresponding new Bank, is a creature of statute. The fact that it is required to be assessed to income-tax as an Indian company does not make it a company incorporated under the Indian Companies Act. In fact, if it was a company under the Companies Act, section II of the Act would be redundant."

It may be seen that the above ruling relied heavily on *Sukhdev Singh's case*, (1975) Lab.I.C. 881 : (1975) 1 S.C.C. 421 : A.I.R. 1975 S.C. 1331.

52. It is the contention of Mr. N.G.R. Prasad, the learned Counsel for the appellant that the tests applied to determine whether a particular authority is an authority under the Government of India, have no relevancy whatsoever to determine an establishment under the Central Government. In this case, what is necessary to

be established is that there must be a relationship of master and servant. It was that test which was adopted in a case arising under the Shops Act in *Madras State Electricity v. Commissioner of Labour,* (1960) 2 L.L.J. 357. A similar view was taken in *Madras State Electricity Board v. Commissioner of Labour,* (1961) 1 L.L.J. 297 : (1961) 1 M.L.J. 247. The same principles have been adopted by a Full Bench of the Kerala High Court in *Canara Bank v. Appellate Authority,* (1981) 2 L.L.J. 189 : (1981) K.L.T. 413 and *Jacob v. State Bank of Travancore,* (1972) K.L.T. 914 : (1973) R.C.J. 168 : A.I.R. 1973 Ker. 51.

53. In opposition to this, it is argued by Mr. M.R.Narayanaswami, learned Counsel appearing for the Bank that the tests that have been applied under Article 12 to determine whether an authority is under the Government of India would be the tests to determine the question arising here, namely, whether a particular establishment is an establishment under the Government of India.

54. We have already extracted Article 12 of the Constitution of India. In view of this Article the Courts were concerned in determining when an authority could be said to be 'under the control of government of India'. It cannot be gainsaid that this definition of 'State' is only for the purposes of Part III of the Constitution, namely, the Fundamental Rules. Part XIV of the Constitution of India, which deals with the services under the Union and the States, is inapplicable to a servant under the authority falling under Article 12 of the Constitution. That is evident from language of Article 311, where for bringing the benefit of that Article, he must be:- 1) a member of a civil service of the Union; 2) a member of an all India service; 3) a member of a civil service of a State; 4) a member holding a civil post under (a) Union (b) State. We will now refer to the relevant case laws as to the tests adopted in determining the meaning of an authority under the control of the Government of India. The leading case is *Sukhdev Singh's case,* (1975) Lab.I.C. 881 : (1975) 1 L.L.J. 399 : A.I.R. 1975 S.C. 1331. There the question arose whether (1) the Oil and Natural Gas Commission; (2) Life Insurance Corporation; and (3) the Industrial Financial Corporation, are authorities within the meaning of Article 12 of the Constitution. In paragraph 29, the learned Chief Justice observed after referring to Halsbury's Laws of England, as follows:-

"39. A public authority is a body which had public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit.'

'44. All these provisions indicate at each stage that the creation, composition of membership, the functions and powers, the financial powers, capital, the borrowing powers, the dissolution of the Commission and acquisition of land for the purpose of the company and the powers of entry are all authority and agency of the Central Government.'

'50. The structure of the Life Insurance Corporation indicates that the Corporation is an agency of the Government carrying on the exclusive business of life insurance. Each and every provision shows in no uncertain terms that the voice is that of the Central Government and the hands are also of the Central Government."

In paragraph 109, Mathew, J., observed as follows:-

"109. The relevant provisions of the Life Insurance Corporation Act have been very clearly analysed in the judgment of my Lord, the Chief Justice, and it is unnecessary to repeat them. It is clear from those provisions that the Central Government has contributed the original capital of the Corporation, that part of the profit of the Corporation goes to that Government, that the Central Government exercises control over the policy of the Corporation, that the Corporation carries on a business

having great public performance and that it enjoy a monopoly in the business. I would draw the same conclusions from the relevant provisions of the Industrial Financial Corporation Act which have also been referred to in the aforesaid judgment. In these circumstances, I think, these corporations are agencies or instrumentalities of the 'State' and are, therefore, 'State' within the meaning of Article 12. The fact that these Corporations have independent personalities in the eye of law does not mean that they are not subject to the control of Government or that they are not instrumentalities of the Government. These Corporations are instrumentalities or agencies of the State for carrying on business which otherwise would have been run by the State departmentally. If the State had chosen to carry on these businesses through the medium of Government departments, there would have been no question that actions of these departments would be 'State actions'. Why then should actions of these Corporations be not State actions?"

According to Mr. M.R.Narayanaswami, learned Counsel for the writ petitioners, having regard to the close similarity between the Life Insurance Corporation Act and Central Act V of 1970, undoubtedly Nationalised Bank would be an establishment under the Government of India'. We will now draw a tabular statement of the provisions of the two Acts.

Central Act 31 of 1956 (L.I.C. Act)	Central Act V of 1970
S.3 Establishment	S. 3
S.5 Capital	S. 3(3)
S.5(2) Body Corporate	S. 3(4) Body Corporate
S.7 Vesting section	S. 4
S.7(2) Assets, meaning thereof	S. 5(1) Assets
S.18 Location of Central Office	S. 7 Location of Head Office and management
S. 11 and 11(4) Provisions relating to existing employees	Ss.12, 12(2) and 12(4)
Ss. 24 to 28, 28A Finance, Audit and Accounts	S. 10
S. 38 Dissolution	S. 18
S. 49 Power to make Regulations	S. 19

We have already stated that the benefit of Article 311 of the Constitution of India cannot be availed of by the employees of an authority under the control of Government of India. Our view is based on the finding of the Supreme Court in paragraph 67 of *Sukhdev Singh's case*, (1975) Lab.I.C. 881 : A.I.R. 1975 S.C. 1331.

55. If it is really a case of ascertaining the meaning of the word 'authority under the control of Government of India', certainly having regard to the close similarity between Life Insurance Corporation Act and Central Act V of 1970, without hesitation we would have held that the Bank is an authority. But, we are to construe the meaning of 'an establishment under the Central Government'. How best these decisions could be applied, we will consider after referring to a few other cases.

56. In *Ajay Hasia v. Khalid Mujib*, (1981) I L.L.J. 103 : A.I.R. 1981 S.C. 487, the question arose whether the Regional Engineering College, Srinagar, one of the 15 Engineering Colleges in the country sponsored by the Government of India, would be an authority within the meaning of Article 12 of the Constitution of India. That college was established and its administration and management were carried on by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1898. At page 493, it was observed:-

"It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government."

This case referred to the decision in *R.D. Shetty v. The International Airport Authority of India*, (1979) 2 L.L.J. 217 : (1979) 3 S.C.C. 489 : A.I.R. 1979 S.C. 1628, and approved the following observations contained in that judgment:-

"A Corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of the Government. But ordinarily where corporation is established by a statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy in matters. So also a corporation incorporated under law is managed by a Board of Directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions, immaterial? Now, one thing is clear that if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a Board of Directors appointed by Government though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from Governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate any inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not."

The Court then proceeded to indicate the different basis, apart from ownership of the entire share capital:

"......If extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with purpose for which the Corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstances supporting an instrumentality or agency of Government.... It may therefore be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation it would afford some indication of the corporation being impregnated with Governmental character..... But a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action-- *Vide Sukhdev v. Bhagatram*, (1975) 1 S.C.C. 421 : (1975) 3 S.C.R.

619 : A.I.R. 1975 S.C. 1331. So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the Corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the Corporation's ties to the State.

'There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the Corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action may yield to a conception of State action where public functions are being performed-- *vide* Arthur S. Miller 'The Constitutional Law of the Security State', 10 Stanford Law Review 620 at 664.

'It may be noted that besides the so-called traditional functions, the modern State operates as multitude of public enterprises and discharges host of other public functions. If the functions of the Corporation are of public importance and closely related to Government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J. in *Sukhdev v. Bhagatram*, (1975) Lab.I.C. 881 : (1975) 2 S.C.R. 619 : A.I.R. 1975 S.C. 1331, where the learned Judge said that 'institutions, engaged in matters of high public interest of performing public functions are by virtue of the nature of the functions performed Government agencies. Activities, which are too fundamental to the society are by definition too important not to be considered Government functions'."

The Court, however, proceeded to point out with reference to the last function test:-

"...the decisions show that even this test of public or Governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of Governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between Governmental functions and non-Governmental functions. Perhaps the distinction between Governmental and non-Governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social status has no place. The contract is rather between Governmental activities, which are private and private activities which are Governmental Mathew, J., in *Sukhdev v. Bhagatram*, (1975) Lab.I.C. 881 : (1975) 2 S.C.R. 619 : A.I.R. 1975 S.C. 1331. But, the public nature of the function, if impregnated with Governmental character or 'tied or entwined with Governmental or fortified by some other additional factor, may render the Corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference.

These observations of the Court in the *International Airports Authority's case*, (1979) 3 S.C.R. 489 : (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628, have our full approval."

The test for determining, when a Corporation could be said to be an instrumentality, was stated in paragraph 9 as under:-

"9. The tests for determining as to when a Corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *International Airports Authority's case*, (1979) 3 S.C.C.

489 : (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628. These tests are not conclusive or clinching, but they are merely indicative indicia, which have to be used with care and caution, because while stressing the necessity of a wide meaning or be placed on the expression 'other authorities', it must be realised that it should not be stretched so far as to bring in every autonomous body, which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the *International Airports Authority's case*, (1979) 3 S.C.C. 489 : (1979) 2 L.L.J. 217 : A.I.R. 1979 S.C. 1628, as follows:-

(1) 'One thing is clear that if the entire share capital of the Corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.

(2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(3) 'It may also be a relevant factor.... whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) 'Existence of deep and pervasive State Control may afford an indication that the Corporation is a State agency or instrumentality.

(5) 'If the functions of the Corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) 'Specifically, if a department of Government is transferred to a Corporation it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority's case*, (1979) 3 S.C.C. 489 : A.I.R. 1979 S.C. 1628, be an "authority" and, therefore, "State" within the meaning of the expression in Article 12."

The above said decision referred to *U.P. Warehousing Corporation v. Vijayanarain*, (1980) 1 L.L.J. 222 : (1980) 3 S.C.C. 459 : A.I.R. 1980 S.C. 840, and the observations made by the learned Judge (Chinnappa Reddy, J.), are also reinforced. It was observed in paragraph 15 as under:-

"It is in the light of this discussion that we must now proceed to examine whether the Society in the present case is an 'authority' falling within the definition of 'State' in Article 12. Is it an instrumentality or agency of the Government? The answer must obviously be in the affirmative if we have regard to the Memorandum of Association and the Rules of the Society. They dominated by the representatives appointed by the Central Government and the Governments of Jammu and Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college are provided entirely by the Central Government and the Government of Jammu and Kashmir and even if any other moneys are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society have also to be submitted to both the Governments for their scrutiny and satisfaction. The Society is also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in the report of the Reviewing Committee. The control of the State

and the Central Governments is indeed so deep and pervasive that no immovable property of the Society can be disposed of in any manner without the approval of both the Governments. The State and the Central Governments have even the power to appoint any other person or persons to be members of the Society and any member of the Society other than a member representing the State or Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors which is in charge of general superintendence, direction and control of the affairs of the Society and of its income and property is also largely controlled by nominees of the State and the Central Governments. It will thus be seen that the State Government and by reason of the provision for approval, the Central Government also, have full control of the working of the Society and it would not be incorrect to say that the Society is merely a projection of the State or the Central Governments and to use the words of Rao, C.J. in *Sukhdev Singh's case,* (1975) Lab.I.C. 881 : A.I.R. 1975 S.C. 1331, the voice is that of the State and the Central Governments and the hands are also of the State and the Central Governments. We must, therefore, hold that the society is an instrumentality or the agency of the State and the Central Governments and it is an authority within the meaning of Article 12."

Thus, even a Society was held to be an authority within the meaning of Article 12 of the Constitution. In *Electricity Board, Rajasthan v. Mohanlal,* (1968) 1 L.L.J. 257 : A.I.R. 1967 S.C. 1857, the Rajasthan State Electricity Board was held to be an authority under Article 12 of the Constitution of India. In *Heavy Engg. Mazdoor Union v. State of Bihar,* (1970) 1 S.C.J. 35 : (1969) 2 L.L.J. 549 : A.I.R. 1970 S.C. 82, the facts are as under:

"The appellant herein filed a writ petition in the High Court of Patna disputing the validity of the reference to the Industrial Tribunal by the State Government of Bihar of the two following questions for adjudication; firstly, as regards the number of festival holidays and secondly whether the second Saturday of a month should be an off-day for the Heavy Engineering Corporation, Ranchi, a Government Company. The grounds set out in the writ petition were two--(1) the appropriate Government to make the reference was the Central Government; and (2) the questions referred were, at the time, actually pending before the certifying authority under the Industrial Disputes Employees (Standing Orders) Act, 1946 on an application for modification of the company's Standing Orders and therefore, the said questions would not be industrial disputes that could be validly referred to adjudication. The High Court held against both the contentions and upheld the reference. Hence the instant appeal to the Supreme Court with the certificate of the High Court.

Held:- the words 'under the authority of' in section 12 (a) of the Industrial Disputes Act, 1947 mean pursuant to the authority, such as when an agent or servant acts under or pursuant to the authority of his principal or master. That cannot be said of the company incorporated under the Companies Act, 1956, which derives its powers and functions from and by virtue of its memorandum and articles of association.

The mere fact, that the entire share capital of the respondent-company was contributed by the Central Government or the fact that the President of India and certain officers of the Central Government held all its shares do not make any difference. The company is a separate entity.

No doubt, extensive powers are conferred on the Central Government including the power to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salaries of the Company's employees. But these powers are derived from the company's memorandum and articles of association and not by reason of the company being

the agent of the Central Government.

The question whether a corporation is an agent of the State must depend on the facts of each case. Where a status setting up a corporation so provides such a corporation can easily be identified as agent of the State. In the absence of a statutory provision, a commercial corporation acting on its own behalf even though it is controlled wholly or partially by a Government department will be ordinarily presumed not to be a servant or agent of the State."

The contention that it is only the Central Government as the appropriate Government, could make the reference, therefore, fails."

It is the contention of Mr.N.G.R.Prasad, the learned Counsel for the appellants that the company is a separate entity and therefore, it will not be an authority, is a point in his favour. Further, notwithstanding the extensive powers being conferred on the Central Government, including the power to give direction and the power to appoint Directors, it was held that the Heavy Engineering Corporation was not an agent. There is no bar to apply the same ratio in this case as well.

57. In opposition to this it is contended on behalf of the Bank that this case dealt with the situation where, in the absence of a statute, a commercial corporation was acting on its own behalf, it could not be held to be a servant or agent of the State. Therefore, this ruling cannot govern the present case.

58. In order to set at rest this controversy, we will rather refer to the interpretation placed by the Supreme Court on this very case.

59. In the decision in *R.D.Shetty v. Airport Authority*, (1969) 2 L.L.J. 217 : (1979) 3 S.C.C. 489 : A.I.R. 1979 S.C. 1628, to which we have already made a reference, in paragtraph 29 at page 1647 the Supreme Court explains the purport of this ruling as follows:-

"The second decision to which we must refer is that in the *Heavy Engineering Mazdoor Union v. State of Bihar*, (1969) 3 S.C.R. 1014 : (1969) 2 L.L.J. 549 : A.I.R. 1970 S.C. 82. The question which arose in this case was whether a reference of an industrial dispute between the Heavy Engineering Corporation ltd., (hereinafter referred as the Corporation) and the Union made by the State of Bihar under section 10 of the Industrial Disputes Act, 1947 was valid. The argument of the Union was that the industry in question was carried on 'under the authority of the Central Government' and the reference could, therefore, be made only by the Central Government. The Court held that the words 'under the authority' mean 'pursuant to the authority, such as where an agent or a servant acts under or pursuant to the authority of his principal or master' and on this view, the Court addressed itself to the question whether the Corporation could be said to be carrying on business pursuant to the authority of the Central Government. The answer to this question was obviously 'no' because the Corporation was carrying on business in virtue of the authority derived from its memorandum and articles of association and not by reason of any authority granted by the Central Government. The Corporation, in carrying on business, was acting on its own behalf and not on behalf of the Central Government and it was therefore not a servant or agent of the Central Government in the sense that its sanctions would bind the Central Government. There was no question in this case whether the Corporation was an instrument and therefore an 'authority' within the meaning of Article 12. We may point out here that when we speak of a Corporation being an instrumentality or agency of Government, we do not mean to suggest that the Corporation should be an agent of the Government in the sense that whatever it does, should be binding on the Government. It is not the relationship of principal and agent, which is relevant and material but whether the Corporation is an instrumentality of the Government in the sense that a part of the governing power of the State is located in the

Corporation and though the Corporation is acting on its own behalf and not on behalf of the Government, its action is really in the nature of State action."

60. The next case which could be referred to is *Biharilal Dombray v. Roshanlal*, (1984) 1 S.C.C. 551 : A.I.R. 1984 S.C. 385. This case dealt with the meaning of office of profit under the Government of India and the test to be adopted for determination of such an office. At page 395, it was observed:

"Even though the incorporation of a body corporate may suggest that the statute intended it to be a statutory corporation independent of the Government, it is not conclusive on the question whether it is really so independent. Sometimes the form may be that of a body corporate independent of the Government, but, in substance it may be just the alter ego of the Government itself. The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by (the) several other bodies or committees over it and their composition, the degree of its dependence on Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of Government."

61. The Indian Statistical Institute which is a Society registered under the Societies Registration Act, whether would be an authority within the meaning of Article 12 of the Constitution of India, came up for consideration in *B.S.Minhas v. Indian Statistical Institute*, (1983) 4 S.C.C. 582 : (1984) 1 L.L.J. 67 : A.I.R. 1984 S.C. 363. In paragraph 20 at page 396, a reference was made to the earlier rulings in *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 S.C.C. 722 : (1981) 1 L.L.J. 103 : A.I.R. 1981 S.C. 487, and held that the expression 'other authorities' in Article 12 must be given a broad and liberal interpretation. On that basis, it was concluded that having regard to the control exercised by the Government of India, it would be an 'authority'. In an unreported judgment (*vide* C.R.P.No.2632 of 1979) to which one of us was a party the question was entirely different. There the question was whether the property of the Bank could be considered to be the property of the Government to claim the benefit of the doctrine of immunity of instrumentality. I answered in the negative. That can be of no assistance in deciding the issue involved in this case. Thus, on an analysis of the above rulings, two legal propositions emerge;

1. The statutory Corporation like the Nationalised Bank over which the Government of India exercises deep and pervasive control is undoubtedly an 'agency' or 'instrumentality' of the Central Government;

2. No doubt, as a statutory corporation it is a legal person. As such it has separate legal status and a personality of its own. It has powers to acquire, hold and dispose of property. But that does not in any way militate against the principle of they being authorities under the control of Government of India.

62. In this context, we will now proceed to deal with the cases arising under the Shops Act of the various States. The relevant provisions with regard to execution in each of the State Acts are as follows:-

Establishments Act:

1. Tamil Nadu Shops and Establishments Act--S.4(1)(c) 2. Kerala Shops and Establishments Act--S.3(1)(c) 3. Andhra Pradesh Shops and Establishments Act, S.64(1)(b) 4. Pondicherry Shops and Establishments Act,S.4(1)(c)	Nothing contained in this Act shall apply to ... establishments under the Central and State Governments, Local Authorities, Reserve Bank of India, Railway administration operating any Railway as defined in clause 20, Article 366 of the Constitution and Cantonment authorities.

5. Karnataka Shops and Establishments Act, S. 3 (1) (a)	Nothing in this Act shall apply to offices of or under the Central and State Governments of local authorities except commercial undertakings.
6. Bombay Shops and Establishments Act--Bombay Act 1979 of 1948, S. 4	Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the 3rd column of schedule 2 shall not apply to the establishments, employees and other persons mentioned against them in the 2nd column of the said schedule.
7. Schedule II-item 1	1. Establishments of the Central Government. 2. Establishments of the State Government * 3. Establishment of the Local Authorities. * 4. Establishments of the Bombay Port Trust. * 5. Establishments of any Railway Administration. * All provisions.

63. In *Madras State Electricity Board, v. Commissioner of Labour*, (1960) 2 L.L.J. 357, this Court had held that the then Madras State Electricity Board was not entitled to exemption from the purview of section 4 (1) (c) of the Tamil Nadu Shops and Establishments Act. The Court reasoned as follows:-

"That the Electricity Act gives the State Government a measure of control over the activities of the Board which, subject to that control, is an autonomous body, did not admit of any doubt I do not think it is necessary to discuss in detail the statutory provisions of the Electricity Act to examine the degree of control which the State Government could lawfully exercise. It, was clear that the employees of the Board were not employees of the State Government. The clerical employees of the Board constituting an establishment and a commercial establishment within the meaning of section 2 (3) of the Shops and Establishments Act, were not the clerical employees of the State Government, and therefore, the establishment cannot be viewed as an establishment under the State Government within the meaning of section 4 (1) (c) of the Act.

That the Board was under the control of the State Government did not make them employees of the Government, nor did it make the establishment consisting of the clerical employees an establishment under the State Government. It is the direct relationship of master and servant between the State Government and the persons employed in the establishment or commercial establishment that is necessary to take that establishment outside the scope of the Act under section 4 (1) (c)."

What came up for discussion in that case was whether the clerical employees of the Board would as such be the employees of the Government. It was not the entire establishment as such that came up for consideration. Therefore, the insistence of the relationship of master and servant is out of place.

64. In *Madras State Electricity Board v. Commissioner of Labour*, (1961) 1 L.L.J. 297 : (1961) 1 M.L.J. 247, this Court relying on *Narayanaswami v. Krishnamurthi*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343, held that it was not a department of the Government. This reasoning was based on the ruling just now referred, namely, *Narayanaswami v. Krishnamurthi*, (1958) 1 M.L.J. 367 : A.I.R. 1958 Mad. 343. In that case, it was held that the Life Insurance Corporation was not a department of the Government of India. Therefore services under the Corporation would not tantamount to service under the Government. It is on this basis, Mr. N.G.R. Prasad, contends that the consistent view of this Court is, in order that it